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PAUL J. GEORGIA,
 Complainant,

v.

Secretary, DEPARTMENT of
 REVENUE,
 Respondent.

Case No. 90-0091-PC-ER

* * * * *

DECISION
AND
ORDER

This matter is before the Commission on an allegation by complainant that respondent unlawfully denied him family leave in violation of §103.10(1) Wis. Stats. and an appeal by complainant of an Initial Determination of no probable cause to believe respondent would have terminated complainant if it had provided entitled family leave or had not retaliated against him for taking such entitled leave. The following is based on an evidentiary hearing on this matter. To the extent any of the discussion constitutes a finding of fact it is adopted as such.

FINDINGS OF FACT

1. Complainant was hired by respondent as a Field Auditor 2 trainee on June 8, 1987 and was one of eighteen (18) persons in respondent's field auditor training program.
2. All trainees received written evaluations every three (3) months and were required to serve a twenty four (24) month probationary period.
3. Complainant's three (3) month evaluation, completed September 8, 1987, indicated his job performance was satisfactory.
4. On September 29, 1987, shortly after the birth of his first child, complainant requested and obtained a leave without pay from September 23, 1987 through September 28, 1987.
5. Complainant's next evaluation, completed on November 11, 1987, described his job performance as satisfactory.
6. Complainant's nine (9) month evaluation was completed on February 25, 1988. Here, his job performance was described as adequate.

7. In his twelve (12) month evaluation, complainant's job performance was summarized as follows:

Paul's performance has not been consistent, as he has performed very well at times and at other times he has been distracted. He shows good potential.

8. In June 1988, after a year in the Madison office, complainant continued his training in respondent's Milwaukee District office.

9. On July 14, 1988 complainant was advised by memorandum from Carol Van Duser, his immediate supervisor, that on four occasions he had failed to inform her of anticipated late arrivals or absences and was in violation of the work rule. Also, complainant was advised not to take any leave without advanced approval or written explanations provided by a doctor.

10. On August 5, 1988 complainant was issued a written reprimand by John Leidiger, the supervisor over complainant and Ms. Van Duser, which stated:

Under date of July 14, 1988, your supervisor, C. J. Van Duser, advised me by carbon copy of a memo to you that you were late or absent for work on four occasions in less than four weeks since your assignment to Milwaukee. She further advised me that you refused to sign that memo to indicate that you understand that you cannot take vacation or sick leave without prior approval and all unapproved absences will result in leave without pay. Because of your conduct, I am sending you this written reprimand. . .

11. Respondent's written procedure for sick leave required an employee to notify his supervisor within one-half (1/2) hour of his scheduled starting time of an unanticipated absence.

12. Respondent's written procedure for leave of absence without pay required the employee to confer with his supervisor then to prepare a leave request form and submit them to his supervisor. Bureau Director approval was needed for leave requests of more than three working days.

13. Between June 23, 1988, and August 10, 1988, complainant trained with four experienced auditors, who filled out progress reports regarding complainant's work. These reports, using a fifteen point rating scale for each of the ten factors, show complainant's score distribution as: 0 Excellent; 2 Above Average; 19 Average; 15 Below Average; 0 Unsatisfactory and 4 Not Applicable.

14. On August 21, 1988, complainant telephoned Carol Van Duser, advised her that his wife had just given birth to their second child and that he would return to work on Wednesday, August 24, 1988.

15. At 10:00 a.m. on Thursday, August 24, 1988, complainant telephoned the office of respondent and left a message for Carol Van Duser that he would not be in to work because the baby had jaundice.

16. Complainant did not report for work Thursday or Friday, August 25 and 26, or cancel his appointments, nor did he report for work the following Monday.

17. This six day period — August 22nd through August 29th, in which complainant was off work, was approved and accounted for by respondent as 21 hours of sick leave, 3 hours of vacation leave and 24 hours of leave without pay. At the time, complainant's accrued leave consisted of 21 hours of sick leave and 3 hours of vacation.

18. Complainant, on July 14, 1988, advised Carol Van Duser that at the birth of his child he intended to take a week off without pay. Van Duser sent this information to her supervisor, John Leidiger in a note dated July 18, 1988.

19. Respondent's policy regarding leave of absence without pay required an employe to:

1. Confer with the supervisor about need for leave.
2. Prepare both the Leave Without Pay Request/Authorization and the Leave Request/Report and submit them to his/her supervisor.

20. No documentation was presented showing complainant requested two weeks off from work or leave without pay and the Commission finds accordingly.

21. Complainant's fifteen month evaluation completed on September 2, 1988, indicated his job performance was "disappointing." Forty two percent of complainant's grades from his trainers were rated below average.

22. On September 16, 1988 complainant was absent from work for two hours and presented his supervisor with a note from a physician indicating that complainant had taken his children to the doctor for treatment.

23. On October 13, 1988 complainant was issued a written reprimand from Carol Van Duser stating that he had failed to adhere to security instructions which resulted in the theft of a laptop computer, related equipment, a briefcase, a tax payer file, statutes and administrative code.

24. Complainant was absent from work for five and a half (5 1/2) days between October 10 and October 17, 1988. Subsequently, based on a physician's verification of illness, leave approval was given by Van Duser and complainant was reported as on leave without pay for October 11, 12 and 17 and on sick leave for 4 hours on October 13 and 8 hours on October 14, 1988.

25. Complainant's eighteenth month evaluation summary read:

Paul has gotten a slow start in auditing on his own. This is due in part to missing over two weeks of work for health related reasons. In addition, the theft of two taxpayer files required some audit work to be redone. Paul's professional appearance has improved over this rating period.

26. Complainant was on sick leave 8 hours, December 23, 1988; 3 hours, January 4, 1989; 8 hours, January 19th; and 8 hours, January 20th. Also, complainant was on annual vacation leave, January 3rd; 2 hours, January 30th; and February 13th.

27. In complainant's twenty one month evaluation, completed February 24, 1989, his job performance was summarized as: "not clearly demonstrat[ing] a desire and ability to perform the duties of field auditor." Also, in the evaluation report, Van Duser recommended termination.

28. Complainant met with his Section Chief, John Leidiger and his division administrator, Jerome Pionkowski. Leidiger and Pionkowski offered complainant reassignment to a different supervisor and extension of his probationary period. Complainant did not accept the offer.

29. Subsequently, complainant was informed by letter that his employment with respondent was being terminated on March 24, 1989. The letter, dated March 16, 1989, was under the signature of respondent's Director of the Bureau of Human Resources.

CONCLUSIONS OF LAW

1. This matter is appropriately before the Commission pursuant to §103.10 Stats.

2. Complainant has the burden to show respondent denied complainant family leave he was entitled to under §103.10 Stats; and to show there is probable cause to believe respondent would not have terminated complainant, if he had been provided entitled leave and/or if respondent had not retaliated against him for taking entitled family and/or medical leave

3. Complainant has not sustained this burden.
4. Respondent did not violate §103.10 Stats. in regard to any of the allegations expressed by complainant in this action.

DISCUSSION

The Family and Medical Leave Act provides, in pertinent part:

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 homes, as defined in s. 50.01(3), or hospice.
2. Outpatient care that requires continuing treatment or supervision by a health care provider.

103.10(3)(a)1. In a 12-month period no employe may take more than 6 weeks of family leave under par. (b) 1 and 2.

(b) An employe may take family leave for . . .

1. The birth of the employe's natural child, if the leave begins with 16 weeks of the child's birth.

* * *

3. To care for the employe's child, spouse . . ., if the child, spouse . . . has a serious health condition.

103.10(4) MEDICAL LEAVE. (a) Subject to pars. (b) and (c), 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.

* * * * *

(c) An employe may schedule medical leave as medically necessary.

103.10(6)(b) If an employe intends . . . to take medical leave because of the planned medical treatment or supervision of the employe, the employe shall do all of the following:

1. Make a reasonable effort to schedule the medical treatment or supervision so that it does not unduly disrupt the employer's operations, subject to the approval of the health care provider of the . . . employe.
2. Give the employer advance notice of the medical treatment or supervision in a reasonable and practicable manner.

103.10(7) CERTIFICATION (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 . . . of the employe . . .

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

1. That the child, spouse, parent or 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.

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

(b) No person may discharge or in any other manner discriminate against any individual for opposing a practice prohibited under this section.

(c) Section 111.322(2m) applies to discharge or other discriminatory acts arising in connection with any proceeding under this section.

In complainant's brief, complainant alleges that, prior to the birth of his daughter on August 21, 1987, he requested one week leave without pay in addition to his accrued sick leave; that on August 21, 1987 Ms. Van Duser (his supervisor) was notified of the birth of his daughter and complainant's need to take the time off as previously requested on July 18, 1988. Further, complainant contends that Ms. Van Duser denied his request in violation of the family leave law.

Under §103.10(3) Stats. complainant was entitled to 6 weeks family leave for the birth of his daughter, to be commenced within 16 weeks of the birth. Complainant was also entitled to family leave, under the same statutes, if any of his immediate family suffered from a "serious health condition" as defined by §103.10(1)(g). The question before the Commission is whether complainant was denied 2 weeks of family leave as he claims.

Complainant argues that he requested 2 weeks of family leave, including one week of leave without pay. In support he points to a July 18, 1988 memorandum written by his supervisor, Ms. Van Duser. This memorandum written to the Section Chief John Leidiger, reported that complainant said: he had no intention of asking for a doctor's slip when his wife has their baby. And that he intends to take a week off without pay. Other writings (notations) by Ms. Van Duser (Respondent's Exhibit 18), report that complainant called Ms. Van Duser on August 21, 1988 at 9:30 p.m., advised her of the birth of his daughter and told her he would probably return to work on Wednesday, August 24 and that he thought he would be about 3 hours short on sick leave.

Van Duser told complainant he could make that time up. The evidence shows that complainant did not go back to work until August 30 and the respondent approved complainant's use of a combination of various kinds of leave to cover the period, from August 22 through August 29, 1988, he was off work. Also, testimony and documenting evidence shows that, during this period at issue, complainant was granted paid and unpaid leave on September 16, 1988; October 10 through 17, 1988; December 23, 1988; January 3, 4, 19, 20 and 30, 1989; and February 13, 1989.

Ms. Van Duser testified that respondent's policy required an employe to confer with his supervisor about any leave of absence without pay and then submit a leave form to his supervisor. Request for more than 3 working days had to be approved by the bureau director. She testified that because of complainant's work attendance record, he was required to obtain advance approval or a doctor's verification of any leave taken. She also testified that she did not recall complainant requesting 2 weeks of leave and that, during this period at issue, complainant never made any written requests for leave. Mr. Leidiger, Van Duser's immediate supervisor, testified that he did not recall any discussion with Van Duser about any leave request by complainant. Also, complainant's bureau director testified that he did not recall any discussions regarding any requests by complainant for leave, nor did he recall ever denying requests for family leave.

With the exception of complainant's statement that he had requested one week of leave without pay in addition to his accrued sick leave "near" the time his daughter born and his interpretation of Ms. Van Duser's memorandum dated July 18, 1988, which refers only to his intent to take off 1 week of leave without pay, there is no evidence to support complainant's claim. The record shows that complainant knew respondent's procedure for obtaining leave, yet it was his practice to obtain leave approval after the fact. The record also shows that complainant was granted family leave when requested even though he failed to comply with respondent's procedures for requesting leave. Finally, the record does not contain any evidence of written requests, or dates, places and conversations regarding request of leaves, allegedly denied by respondent. Therefore, the Commission must conclude complainant failed to sustain this allegation

Regarding his termination, complainant makes two assertions. They are: 1) there is "probable cause" to believe he would not have been

terminated from his position, if he had been provided all leave to which he was entitled under the Family Leave Act. 2) there is "probable cause" to believe he was retaliated against for exercising his rights under the Family Leave Act.

Complainant presented no evidence and made no argument in his brief supporting his first assertion. Accordingly, the Commission must reject complainant's first contention.

With respect to complainant's second assertion, he argues that had Ms. Van Duser accepted an audit, he would have met the field audit trainee production standard and he would not have been terminated. In support, he argues that his job performance was rated "very adequate" in all reviews prior to Ms. Van Duser's unit, that Ms. Van Duser's supervisory career is highlighted by her experience in the military as a drill sergeant and that Ms. Van Duser lied to mislead the Commission into believing he was performing below the production standards.

These arguments of complainant are not supported by the record. Performance evaluation reports in evidence show that complainant's work was rated satisfactory for the first six months of his employment, adequate for months 6 through 9 and inconsistent for months 9 through 12. Also, there is no evidence in the record which supports complainant's allegation that Ms. Van Duser lied about information concerning the rejected audit which caused complainant to be below trainee production standards. On direct examination, Van Duser testified that she believed complainant's rejected audit consisted of a maximum of three actions and complainant needed four actions to meet the production standard. Under cross examination by complainant, Van Duser acknowledged that, if the facts were as posed in complainant's question, the rejected audit would include four actions — enough to meet the trainee production standard. Notwithstanding complainant's failure to substantiate factual underpinnings of these questions, contrary to his allegation, this testimony by Van Duser was neither inconsistent nor unbelievable.

It is problematical whether Van Duser's acceptance of the multiple-action audit by complainant would have affected her recommendation or respondent's decision to terminate him. The record shows that Van Duser and Leidiger thought complainant had a poor work attitude. Shortly after he was assigned to Milwaukee, complainant was given a written reprimand for failing

to follow procedure regarding late arrivals and absences from work. Later complainant received a written reprimand for violating work rules, which resulted in theft of department property and loss of tax payer files. Complainant's audit trainers rated him "below average" in learning, job attitude and work habits. Ms. Van Duser testified that complainant never met trainee production goals while in her unit and she gave complainant only marginally satisfactory grades on her evaluations of the audit performed by him. Van Duser also testified that complainant's failure to meet production goals was only one of the reasons for recommending his termination.

Finally, prior to termination, complainant was given an opportunity by his division head for reassignment to another unit, under a different supervisor and an extension of his probationary period, but he elected not to accept those options. Based on the evidence presented, the Commission can only conclude that complainant's termination was the result of his poor work performance and not the various unsubstantiated reasons expressed by him.

ORDER

This complaint is dismissed.


Dated: January 24, 1992

STATE PERSONNEL COMMISSION


LAURIE R. McCALLUM, Chairperson

DRM/gdt/2


DONALD R. MURPHY, Commissioner


GERALD F. HODDINOTT, Commissioner

Parties:

Paul J Georgia
2120 Mahon Ct
Green Bay WI 54322

Mark D. Bugher
Secretary DOR
125 S Webster St
P O Box 8933
Madison WI 53707