STATE OF WISCONSIN PERSONNEL COMMISSION

**STEVE PRELLER,**
***Complainant,***

**v.**

**Chairperson, UNIVERSITY OF WISCONSIN HOSPITALS AND CLINICS BOARD,**
***Respondent.***

Case Nos. 96-0151-PC-ER, 97-0046-PC-ER, 97-0074-PC-ER

DECISION AND ORDER

NATURE OF THE CASE

These are complaints alleging violation of the Family and Medical Leave Act (FMLA), and retaliation for engaging in protected fair employment and FMLA activities. A hearing was conducted on September 29 and 30, 1997, and February 13, 1998, before Laurie R. McCallum, Chairperson. The parties were permitted to file post-hearing briefs and the briefing schedule was completed on June 12, 1998.

FINDINGS OF FACT

1. At all times relevant to this matter, prior to complainant's termination, complainant was employed by respondent as a Hospital Supply Clerk in the Materials Management/Central Services unit.

2. UWHC policy 9.13 states as follows in pertinent part:

**Review:**

> It will be the responsibility of each designated departmental representative or the appropriate supervisor to monitor the attendance record of each employee and to determine through a review process whether excessive absenteeism, excessive tardiness or sick leave abuse exists. A review of an employee's attendance or punctuality may be initiated if any of the following circumstances exist:

A. three (3) unscheduled absences of any length in any 12 week period, including for reasons of illness or personal business,

B. any "0" sick leave balance,

C. the use of unscheduled leave under false pretenses,

D. a pattern of unscheduled absence in conjunction with:

- scheduled days off,
- legal holidays,
- weekends,
- same days of the week,

E. unscheduled absences:

- immediately following discipline,
- after working a double shift,
- after working overtime,
- after having a leave request denied,
- under any other suspicious circumstance as determined by a department manager,

F. tardiness on three occasions within a 12 week period. (Tardiness is defined as failing to report promptly, ready to work, at the scheduled starting time of the shift or taking unauthorized extended rest or meal periods.)

If a review of an employee's attendance is initiated, the manager must take into consideration any mitigating circumstances before determining that possible excessive absenteeism, excessive tardiness or sick leave abuse exists. Discipline is NOT to be automatically applied until the following procedure is followed.

The manager should arrange for a pre-disciplinary investigatory (PDI) meeting with the employee whose record is being reviewed. For represented employees a union representative may be present. The attendance or tardiness record is to be discussed with the employee in an attempt to determine if there is a mitigating reason for the poor record or possible abuse. The manager must be willing to work with the employee to resolve whatever circumstances are adversely affecting the attendance record.

**Progressive Discipline:**

A. If, after the PDI, the manager determines that a violation of policy exists and that discipline is appropriate, progressive discipline is to be applied according to the following schedule:

- 1st violation - verbal reprimand,
- 2nd violation - written reprimand,
- 3rd violation - 2 day suspension,
- 4th violation - 5 day suspension,
- 5th violation - termination,

B. These progressive steps will be taken in the order listed in all cases except where the manager determines that a violation is serious enough to warrant a higher level of discipline. Examples of serious violations include: no call, no show, or leaving work without authorization.

C. Absences covered under the Federal or State Family Medical Leave laws may not be used as a basis for discipline.

D. Consultation with the employment relations staff in the Human Resources Department is required before suspending or terminating an employee for violation of this policy or any other work rules relating to attendance.

3. In a memo to complainant dated November 11, 1996, Doug Baez, Hospital Supply Supervisor and complainant's first-line supervisor, stated as follows in pertinent part:

> Pursuant to the results of a pre-disciplinary investigation (PDI) meeting held on 10/24/96, this letter is to notify you that you are in violation of UW Work Rules II.B. (Unexcused or Excessive Absenteeism) and IV.J. (Failure to Exercise Good Judgment) in conjunction with UW Hospital & Clinics Policy and Procedure 9.13 (Attendance and Punctuality), and Central Services Administrative Standards. During the period July 16, 1996 through October 4, 1996 (12 weeks) you incurred four unscheduled absences as follows:
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> | | | |
> |---|---|---|
> | 07/16/96 | sick | |
> | 08/20/96 | sick | conjunction with days off |
> | 10/03/96 | sick | conjunction with days off |
> | 10/04/96 | sick | conjunction with days off |

You declined union representation during this meeting and you stated you would represent yourself.

While you refused to answer questions during this meeting, you stated you would submit written answers to my questions at a later date. I agreed to give you until 10/28/96 to respond to the investigation questions and provide mitigating information for consideration in making a disciplinary decision. As I stated at the meeting, your 07/16/96 absence is excused due to satisfactory medical documentation provided by Employee Health Service. Your written answers did not provide any mitigating information (e.g. medical documentation, etc.) concerning your other unscheduled absences.

The remaining three unscheduled absences are unexcused. The absence of 08/20/96 occurred following a day off and preceded another day off. This gave you three days off in a row. The absences of 10/03/96 and 10/04/96 were in conjunction with days off and approved leave time. These two dates preceded nine days off and therefore created eleven consecutive days off from work.

Previously, you received the following discipline for work rule violations in conjunction with UWHC Policy and Procedure 9.13 and Central Services Administrative Standards:

| | |
|---|---|
| 07/27/95 | Verbal Reprimand |
| 08/18/95 | Verbal Warning |
| 11/10/95 | Written Reprimand |
| 12/26/95 | Verbal Reprimand |
| 03/15/96 | Written Reprimand |
| 06/11/96 | Two Day Suspension |

You are suspended from work without pay for five days. The dates of your suspension are 11/18/96, 11/19/96, 11/20/96, 11/21/96, and 11/22/96 (Monday - Friday).

Future violations of the UW Classified Work Rules in conjunction with UWHC Policy and procedure 9.13 and/or CS Administrative Standards may result in additional progressive discipline. Please be aware that per UWHC Policy and Procedure 9.13 the next progressive disciplinary level is discharge from employment. Please note that the opportunity to provide written responses is highly irregular and should be considered an exception. As was stated in the meeting notice, "you are required to fully and completely answer the questions put to you" during investigatory meetings.

Neal Spranger of respondent's Human Resources unit approved this five-day suspension.

4. Some time prior to December 4, 1996, respondent had changed its attendance policy so that tardies and absences were now counted and considered separately, and two successive dates of absence were now counted and considered as two separate occurrences.

5. A PDI was conducted on March 5, 1997, relating to complainant's tardiness and unscheduled absences. Complainant explained in a memo dated March 6, 1997, that he was tardy due to unusual and unanticipated traffic conditions on January 15 and February 18, 1997; but that he had no information explaining his tardiness of more than an hour's duration on December 4, 1996. In regard to his absences which were discussed at this PDI, complainant stated in this memo as follows:

> As I stated at the PDI, I have provided medical certificates for all the sick time used that was discussed. I would like to know immediately if you do not receive sufficient verification from Employee Health of the information I gave them so that I can remedy the problems before you make your disciplinary decision.

6. In a memo to complainant dated May 7, 1997, Mr. Baez stated as follows in pertinent part:

> Your presence is required at a Predisciplinary meeting to be held on 5/8/97 (Thursday ) from 1500-1530 hours in room E5/134A. This meeting is being held to discuss your violations of the following UW Hospital & Clinics Authority Work Rules in conjunction with UWHCA Policy & Procedure 9.13 and Central Services Administrative Standards.
>
> II.B. "Unexcused or excessive absenteeism."
> II.D. "Failure to notify the supervisor promptly of unanticipated absence or tardiness."
>
> I have investigated the following instances of tardiness and unscheduled absences:
>
> | | | |
> |---|---|---|
> | 12/4/[96] | tardy 66 minutes | **unexcused** |
> | 1/15/97 | tardy 2 minutes | excused |
> | 2/18/97 | tardy 3 minutes | excused |

| | | |
|---|---|---|
| 11/26/[96] | unscheduled absence | **unexcused** |
| 1/23/97 | unscheduled absence | excused |
| 1/27/97 | unscheduled absence | **unexcused** |
| 1/28/97 | unscheduled absence | **unexcused** |
| 2/2/97 | unscheduled absence | excused |

As noted, I have excused 2 instances of tardiness and 2 instances of unscheduled absences. You still have 3 unexcused, unscheduled absences within the 12 weeks specified in UWHCA P&P 9.13. Therefore, I specifically wish to hear any mitigating information you would like me to consider when making a disciplinary decision regarding these 3 unexcused, unscheduled absences.

If you refuse to provide any mitigating information, a disciplinary decision will be made based on those sources of information and facts available at that time. Please be aware that per UWHCA P&P 9.13 the next progressive disciplinary level is termination of employment. Diana Miller will attend as your union representative. If you do not want union representation please contact me as soon as possible

7. In a letter to Mr. Baez and Bob Scheuer, complainant's second-line supervisor, dated May 9, 1997, complainant stated as follows in pertinent part:

Attached is the information which I said I would provide to you regarding the predisciplinary meeting held with me yesterday. All of this information has already been provided to Employee Health or to Mr. Baez.

From our meeting and your May 7th letter, I believe that this information responds completely to all unresolved issues raised by you during the meeting, specifically the alleged 3 unexcused unscheduled absences.

In addition to the attached medical documentation, I should also point out the following:

1) January 27th, 1997. The note from your Emergency Room department that I provided to Mr. Baez on that date states that I may also be off on January 28th. Therefore I fail to see why you consider the 28th to be an unscheduled absence, since you had advance knowledge of my possible absence from your own medical staff.

2) January 27 and 28 are consecutive sick days and should be considered one occurrence of absenteeism as you have for other employees who the hospital has not targeted for discipline like I have been.

The following 5 documents are enclosed:

1) Medical certificate from my doctor verifying that my absence on 11/26/97 (sic) was due to a medical condition. As you can see it was received in Employee Health on 11/27/96.

2) Medical documentation from your Emergency Room staff documenting that I was seen and treated by them on 1/27/97 and was excused from work the rest of that evening and possibly the next day. Was not routed properly to EHS. EHS is trying to get this, so check with them. [Complainant testified at hearing that he was mistaken about this and that he was actually seen by EHS on January 27, 1997.]

3) Medical certificate for 1/28/97 from Dr. Hla/EH.

4) Return to work documents from EHS and UWHC Emergency Dept., including limitations.

As I stated to you 2 months ago at the first PDI, if the information I have provided in this letter is insufficient, I want to know in writing specifically how it is deficient so I can provide further information before you make any decision to discipline me.

8. In a letter to complainant dated May 13, 1997, Don Klimpel, Director, Materials Management/Central Services, and Renae Bugge, Director, Employment Relations and Communications, stated as follows in pertinent part:

We are writing regarding the results of the pre-disciplinary meeting which was conducted on May 8, 1997. This meeting was held to discuss your unexcused tardies and absences and to give you an opportunity to offer any information or mitigating circumstances to be considered in deciding the disciplinary actions to be taken.

The unexcused absences and tardiness (listed below) are in violation of University of Wisconsin Hospitals and Clinics Authority Work Rules; *II.A. Failure to report promptly at the starting time of a shift or leaving before the scheduled quitting time of a shift without the specific approval of the supervisor. II.B. Unexcused or excessive absenteeism, II.D.*

*Failure to notify the supervisor promptly of an unanticipated absence or tardiness, and IV.J. Failure to exercise good judgment, or being discourteous in dealing with fellow employees, students or the general public.* These work rules have been violated in conjunction with University of Wisconsin Hospital and clinics Policy and Procedure 9.13 Attendance and Punctuality and Central Services Administrative Standards.

| | |
|---|---|
| 12/4/96 | Tardy |
| 11/26/96 | Unscheduled Absence |
| 1/27/97 | Unscheduled Absence |
| 1/28/97 | Unscheduled Absence |

During the investigatory meeting held on March 5, 1997 you requested and were granted the opportunity to submit a written statement. Based on our investigation of this matter, including consideration of the information provided in your statement, several of the work rule violations cited during that meeting have been excused. However, neither the information provided in your statement nor that provided at the investigatory and pre-disciplinary meetings is sufficient to mitigate discipline in accordance with the Hospital's attendance and punctuality policy for the remaining unexcused violations listed above.

Throughout your employment at University of Wisconsin Hospital and Clinics you have been repeatedly counseled and disciplined regarding your attendance and tardiness. You have received the following discipline for work rule violations, which shows an unacceptable standard of behavior.

DISCIPLINARY HISTORY

| | | |
|---|---|---|
| 7/27/95 | Verbal Reprimand | II.B., IV.J., 9.13, CS Admin Stds |
| 8/18/95 | Verbal Reprimand | I.G., II.A., IV.J., 9.13, CS Admin Stds |
| 11/10/95 | Written Reprimand | II.B., IV.J., 9.13, CS Admin Stds |
| 12/26/95 | Verbal Reprimand | I.G., II.A., IV.J., 9.13, CS Admin Stds |
| 3/15/96 | Written Reprimand | I.G., II.,A., IV.J., 9.13, CS Admin Stds |
| 6/11/96 | Two Day Suspension | I.G., II.A., IV.J., 9.13, CS Admin Stds |
| 11/11/96 | Five Day Suspension | II.B., IV.J., 9.13, CS Admin Stds |

Each of these disciplinary actions resulted from work rule violations occurring within 12 months from the previous violation.

It is apparent that progressive disciplinary suspensions have not had a corrective impact on your work conduct. Therefore, based on the most recent work rule

> infractions and those cited above, we are left with no alternative but to terminate your employment as a Hospital Supply Clerk-obj at University of Wisconsin Hospital and Clinics effective immediately. You may appeal this employment action through provisions contained in the Wisconsin State Employees Union collective bargaining agreement.

9. During the time period relevant to this action, the health conditions for which complainant sought care by a health care provider included: morbid obesity, sleep apnea, and lower back pain. In a disability accommodation request dated September 12, 1995, complainant identified his disability as "chronic lower back pain, swelling of legs, and pain in legs and feet." In response to this request, respondent provided an assessment by an occupational therapist who recommended an ergonomically suitable chair for complainant. Respondent provided this chair to complainant.

10. Complainant's morbid obesity condition was treated by James Giesen, M.D. The record does not show that any of the incidents of tardiness or unscheduled absences considered by respondent in making the decision to impose the five-day suspension or to terminate complainant were caused directly by complainant's morbid obesity condition. The treatment provided complainant for this condition by Dr. Giesen consisted of the drug Fen/phen administered from April of 1996 to December of 1996, and the drug Redux administered from December of 1996 to July of 1997. Sleep apnea is commonly associated with morbid obesity. Complainant's lower back pain resulted from an earlier injury and was exacerbated by his morbid obesity.

11. Complainant's sleep apnea was treated primarily by Mary Klink, M.D. There was a time during complainant's employment by respondent when his sleep apnea condition caused certain incidents of tardiness. However, during the period of time relevant to the five-day suspension and the termination, complainant's sleep apnea was effectively controlled by medication; and none of the incidents of tardiness or unscheduled absences considered by respondent in making the decision to impose the five-day suspension or to terminate complainant were caused in whole or in part by complainant's sleep apnea condition.

12. During the time period relevant here, other than those times when he was temporarily incapacitated by lower back pain, complainant was able to perform all the duties and responsibilities of his position, including physically demanding duties such as walking, lifting, pushing, and pulling.

13. Complainant first experienced lower back pain in 1980. Complainant consulted Dr. Giesen and respondent's Employee Health Service (EHS) and Emergency Department in relation to his back condition. His contacts with Dr. Giesen relating to his back condition prior to his termination consisted of the following:

> (a) Complainant contacted Dr. Giesen's office by phone on November 27, 1996. In response to the representations made by complainant in this phone contact, Dr. Giesen wrote on a prescription form, "Off work 11/26 due to exacerbation of low back pain." Dr. Giesen did not examine or meet personally with complainant on 11/26.or 11/27/96, and did not provide or prescribe treatment for complainant on either of these dates. A copy of the prescription form completed by Dr. Giesen was received by EHS on November 27, 1996.
>
> (b) Complainant visited Dr. Giesen on February 12, 1997, for the purpose of having Dr. Giesen complete an Employee Medical Information Form for respondent as the result of complainant's request that his absence of November 26, 1996, be treated as leave under the Family and Medical Leave Act (FMLA). On February 12, 1997, complainant was not experiencing any back pain, complainant indicated that his most recent episode of back pain had occurred in November of 1996, and Dr. Giesen did not prescribe or provide any treatment, prescribe any medication, or suggest any follow-up.
>
> (c) In response to a phone request from complainant on May 8, 1997, Dr. Giesen prepared, based on complainant's representations during this phone contact, a prescription form which stated that "Due to back problems, this patient was unable to work on 5/6/97 and 5/7/97." Dr. Giesen did not examine or meet personally with complainant on May 6, 7, or 8, 1997, and did not provide or prescribe treatment for complainant on any of these dates.

14. The form completed by Dr. Giesen on February 12, 1997, stated as follows (the form's stated requests for information are in bold type and Dr. Giesen's responses are in regular type):

**1) Please describe the medical condition that impedes or impeded the employee's ability to work or requires the employee to care for the patient:**

Periodic exacerbations of acute low back pain and muscle spasms secondary to a prior back injury.

**2) Indicate the extent to which the employee is unable to perform his or her employment duties because of this condition:**

During the periods of acute exacerbation, he needs to be off work - no bending, lifting, twisting. The episodes will typically last for 1-3 days.

**3) Date condition began:** 11/27/[96]

**4) Please specify date employee may return to work:** 11/27/[96]

**5) Do you anticipate further absences due to the condition:** Yes

**If yes, please explain:** I anticipate that he will re-injure his back from time to time. I don't feel it will lead to chronic or long-term pain. The recurrences will typically be of short 3-5 days.

**PART B**

**1) Does the employee have any restrictions that may impede his/her ability to perform his/her assigned duties?** No

**2) Are these restrictions of a permanent nature?** No

15. Neither EHS nor respondent's Emergency Department are considered treating health care providers. Their primary function relating to respondent's employees as relevant here is to make recommendations relating to whether an employee suffering from a particular health condition should remain at work, and whether an employee should be cleared to return to work. Complainant's contacts with EHS and respondent's Emergency Department relating to his back condition as relevant here consisted of the following:

(a) On May 29, 1992, an assessment of complainant's back condition was conducted by EHS at his request. Complainant was not experiencing lower back pain at that time. ? Hla, M.D., who conducted

this assessment, concluded that complainant showed perfectly normal movement with no pain, and that there was no evidence of back strain or injury.

(b) On January 27, 1997, complainant was seen by Dr. Hla, who indicated in her notes of this visit that complainant was in mild distress from lower back pain, and that she recommended that he go home, rest, use ice and heat, take an over-the-counter anti-inflammatory medication, and return to work the next day. On an EHS Clearance to Work Evaluation Form dated January 27, 1997, Dr. Hla indicated that she estimated that complainant would return to work on January 28, 1997; that complainant required medical evaluation/follow-up; and that he must see EHS before returning to work on January 28, 1997.

(c) On January 28, 1997, complainant telephoned and spoke to Fran Ircink, R.N., EHS Clinic Manager, whose notes indicate that complainant reported that his back was still sore. Mr. Ircink advised complainant to stay home.

(d) On January 31, 1997, complainant had another telephone contact with Mr. Ircink whose notes indicate that complainant reported that his back was still sore but that he wanted to return to work on Saturday, February 1, 1997; and that Mr. Ircink provided a work excuse for January 28, 1997. This excuse was written on a UWHC prescription form, as requested by complainant, with Dr. Hla's name stamped on it, and stated, "Please excuse from work 1/28/97 due to back pain." Mr. Ircink did not consult with Dr. Hla in preparing this excuse. Mr. Ircink's notes further indicate that he recommended that complainant get a return to work clearance from respondent's Emergency Department (ED) on Saturday, February 1, 1997 (EHS was closed on the weekends), and that he spoke to complainant's supervisor who agreed to cover complainant's absence during this visit to the ED.

(e) Complainant visited respondent's ED on February 1, 1997. The return to work instructions generated as a result of this visit indicated that, "We saw Stephen Preller in our Emergency Department on 02/01/97. Stephen should be able to return to work today. Stephen needs the following limitations: limit lifting to 20 pounds for 2-3 days."

(f) Mr. Ircink's notes of February 4, 1997, indicate that complainant saw the ED on Saturday, February 1, 1997, and a return to work with a 20-pound lifting restriction was issued; that complainant reported he missed work on Sunday (2/2/97) because of lower back pain resulting from "overdoing it at home;" that complainant reported that he felt he

> could return to work without restrictions; and that, pursuant to complainant's request, Mr. Ircink gave him an excuse for 2/2/97. This excuse consisted of an EHS Clearance to Work Evaluation Form completed by Mr. Ircink on February 4, 1997, and on which he stated, "Please excuse from work 2/2/97 due to back pain." Mr. Ircink did not see complainant on February 1 or 2, 1997.

16. It was Dr. Hla's opinion as the result of her examination of complainant on January 27, 1997, that his back condition was not a serious health condition under the FMLA. It was Mr. Ircink's opinion, as the result of his contacts with complainant relating to his back condition, that this condition was not a serious health condition under the FMLA.

17. The assistance provided by Dr. Giesen and EHS to complainant in managing his back condition consisted of recommendations for self-care, including rest, use of ice and heat, over-the counter anti-inflammatory medications to relieve the symptoms, and exercise. No treatment was provided in addition to these self-care recommendations.

18. It was respondent's practice, when an employee requested FMLA leave, to provide to the employee a packet of information which included certain forms. This same packet was provided to complainant by Mr. Baez on December 3, 1996, in response to complainant's request that his leave of November 26, 1996, be treated as FMLA leave. This was the first and only time that complainant made such a request and completed the forms. Complainant's request for FMLA leave was reviewed by Sue Minihan of respondent's Human Resources unit who, after consultation with EHS, recommended to Ms. Bugge that the request be denied. Ms. Bugge accepted this recommendation and denied the request.

19. In applying respondent's attendance policy, different supervisors, during the time period relevant here, interpreted the policy differently, particularly in regard to determining whether mitigating circumstances existed to justify excusing an absence. It was not uncommon for an absence to be considered unexcused even though the employee was granted sick leave to cover it. Some supervisors did not excuse an

absence based on a physician's excuse unless the excuse indicated the number of days of absence, the return to work date, and the specific diagnosis. Some supervisors accepted EHS excuses or return-to-work forms to excuse an absence, and some did not.

20. Complainant was not scheduled to work on January 29 through 31, 1997. Complainant did work on February 1, 1997.

21. The disciplinary records of other UWHC employees offered for comparison purposes show the following:

(a) The further along the employee is on an attendance/punctuality disciplinary track, the more rigorously the attendance policy is applied, i.e., the fewer the number of incidents relied upon to support discipline, and the reduced acceptance of self-reported illness as a basis for excusing an unscheduled absence;

(b) An incident of unexcused absence is regarded as a much more serious violation of the attendance policy than an incident of unexcused tardiness.

(c) An incident of unscheduled absence is subjected to more serious scrutiny if it occurs in conjunction with a scheduled day off or benefit day.

22. The disciplinary records of the following UWHC employees, which presented attendance histories most comparable to complainant's, were offered for comparison purposes:

(a) Leanne McGuire - on 3/28/97, received 5-day suspension for 3 unexcused absences coupled with days off or use of benefit time—she offered no mitigating circumstances at PDI—she had received a 2-day suspension on 8/23/96 (unexcused tardiness on 4 days + warning about use of sick leave in conjunction with days off); written reprimand on 2/24/96 (3 unexcused absences +15 tardies); verbal reprimand on 1/6/96.

(b) Kimm Johnson - on 11/6/96, received a 2-day suspension for 3 unscheduled absences, each in conjunction with days off, and 5 tardies—she had received a written reprimand on 4/24/96 (6 unscheduled absences + 5 tardies); verbal reprimand on 1/5/96.

(c) Karen Culp - on 3/14/97, received a 5-day suspension for 2 absences before days off, 2 other absences, and 7 tardies—she had received a 2-day suspension on 5/28/96.

(d) Patricia Frey - on 2/26/97, was terminated for 4 unexcused absences, 3 of which involved self-reported illness (sinus headache, sinus infection, upset stomach)—she also reported during period of time in which her attendance record was being reviewed that she suffered from depression and presented a short note from her physician which respondent did not deem sufficient to justify excusing absences—had received 5-day suspension on 5/26/96.

(e) Jose Rincon - on 11/11/96, received 5-day suspension for 3 unscheduled absences—had received 2-day suspension on 6/19/96.

(f) John Virnig - on 5/30/97, received a 5-day suspension for 2 unscheduled absences immediately following 5 days of suspension—self-reported back pain as mitigating circumstance—respondent determined, based on medical records provided by employee, that he had not visited physician for back pain until 6 days after days of absence and did not excuse absences—had received 5-day suspension on 3/6/97.

(g) Jeff Jones - on 5/16/97, received 5-day suspension for 5 unscheduled absences—had received 2-day suspension on 9/17/96.

23. Complainant filed complaints of discrimination/retaliation with the Commission on November 21, 1996 (Case No. 96-0151-PC-ER), April 18, 1997 (Case No. 97-0046-PC-ER), and June 2, 1997 (Case No. 97-0074-PC-ER).

## CONCLUSIONS OF LAW

1. This matter is properly before the Commission.

2. Complainant has the burden to prove that respondent violated the FMLA as alleged; and that respondent retaliated against him for engaging in protected FMLA and fair employment activities.

3. Complainant has failed to sustain these burdens.

## OPINION

The issues to which the parties agreed are:

> 96-0151-PC-ER: Whether respondent violated the FMLA in connection with the five-day suspension of complainant which was imposed from November 18-22, 1996.
>
> 97-0046-PC-ER: Whether respondent violated the FMLA with respect to its denial of complainant's request for FMLA leave for his November 26, 1996, absence.
>
> 97-0074-PC-ER: (1) Whether respondent violated the FMLA by denying complainant's request for FMLA coverage for his absences on January 27-28, 1997.
>
> (2) Whether respondent retaliated against the complainant for exercising rights protected by the FMLA or for engaging in protected fair employment activities when it discharged him effective May 13, 1997.

The first three issues cited above all relate to protections complainant asserts he is entitled to pursuant to the Family and Medical Leave Act (FMLA). However, in order to obtain the protection of the FMLA, an employee is required to show that he suffers from a "serious health condition." Section 103.10(1)(g), Stats., defines such a serious health condition as:

> . . . a disabling physical or mental illness, injury, impairment or condition involving any of the following:
>
> 1. Inpatient care in a hospital, as defined in §50.33(2), nursing home, as defined in §50.01(3), or hospice.
>
> 2. Outpatient care that requires continuing treatment or supervision by a health care provider.

In *MPI Machining Div. v. DILHR*, 159 Wis. 2d 358, 464 N.W. 2d 79 (1990), the Court stated that "the term 'continuing treatment or supervision by a health provider' in the FMLA contemplates direct, continuous and firsthand contact by a health provider subsequent to the initial patient contact." Complainant's circumstances as relevant here do not fit this interpretation of the term. Complainant testified at hearing that the "continuous treatment or supervision" he received relating to his back condition was provided by Dr. Giesen. However, complainant's contacts with Dr. Giesen relating to

his back condition (see Finding of Fact 13, above), consisted of two phone contacts which do not satisfy the requirement that the contacts be "direct" and "firsthand;" and a visit on February 12, 1997, when complainant was not experiencing any symptoms, which did not involve any treatment or supervision, and which actually related to complainant's absence on November 26, 1996. Clearly, these contacts do not satisfy the requirements of the FMLA definition. See *Lubitz v. UW*, 95-0073-PC-ER, 1/7/98.

Even if complainant's contacts with respondent's Employee Health Service (EHS) and Emergency Department (ED) are considered, the statutory requirement is not met. During the time period relevant here, complainant's first and only direct and firsthand contact with EHS occurred on January 27, 1997, when complainant was already at work and consulted EHS to determine if he should leave work because he was experiencing "mild distress" from lower back pain. During this visit, the only "treatment" provided by Dr. Hla related to directions for self-care. The only other contacts with EHS were phone contacts and did not involve anything that would qualify as treatment or supervision by either Dr. Hla or Mr. Ircink. The complainant's contact with the ED consisted of a return to work clearance form with certain lifting restrictions imposed on February 1, 1997, when complainant indicated that he was not experiencing any significant back pain symptoms. An initial contact which involves a recommendation for self-care and instructions to get a return-to-work clearance prior to returning to work the next day; combined with a return-to-work contact that involves no treatment but simply a recommendation that the employee not lift anything heavy for two to three days with no suggestion for follow-up care or treatment, do not satisfy the FMLA requirement for "continuing treatment or supervision" involving "continuous, direct, and firsthand contact" after the initial patient contact. Furthermore, both Dr. Hla and Mr. Ircink provided expert medical testimony that complainant's back condition was not a sufficient impairment to be considered disabling pursuant to the FMLA.

Complainant has failed to show that his back condition, which he cites as the health condition for which he requested the absences at issue here, qualifies as a serious

health condition under the FMLA. Although complainant also argues that he suffers from sleep apnea and morbid obesity, that these also qualify as serious health conditions under the FMLA, and that the existence of these conditions is relevant to the matters in issue here, this relevance is not apparent. Complainant does not contend that any of the instances of tardiness or any of the absences underlying the personnel actions at issue here resulted from his sleep apnea, or resulted from his morbid obesity other than as this condition exacerbates his lower back pain. The lack of a causal connection between these health conditions, other than as they relate to his lower back condition, and the matters at issue here is fatal to complainant's argument that they should be considered in the context of the alleged violations of the FMLA.

Complainant also argues that, if an absence satisfies the requirements for the granting of sick leave under the applicable collective bargaining agreement or other applicable requirements, this absence should, as a result, be regarded as satisfying the requirements of the FMLA because of the relationship between the two types of leave. Essentially, complainant is arguing that satisfaction of the sick leave requirements should be deemed as satisfaction of the FMLA requirements regardless of the statutory requirements for invoking FMLA protection. This does not follow. There has been no showing that the criteria for the granting of sick leave are essentially identical to the criteria for the granting of FMLA leave. In fact, the record here suggests otherwise. There has also been no citation of convincing authority for the proposition that, once sick leave has been approved for an absence, the absence is protected by the FMLA regardless of whether the statutory FMLA requirements have been met. This would mean that an employee's one-day absence resulting from a 24-hour stomach virus which involved no contact with a health care provider would be considered an absence for a "serious health condition" within the meaning of the FMLA if sick leave were approved to cover the absence. This appears to be clearly contrary to the legislative intent expressed in the FMLA that its protections be limited to disabling conditions which require direct treatment by a health care provider over a period of time. Although complainant cites the testimony of the leave expert employed by the

Department of Employment Relations (DER) that the use of sick leave is automatically charged against an employee's FMLA leave balance as supporting this argument, this specific state agency practice is not before the Commission for review. The Commission can only look to the specific statutory language of the FMLA and the manner in which it has been interpreted to date for guidance in its application here. As stated above, the FMLA appears to clearly be limited by its language to those absences attributable to "serious health conditions" and not to any and all health conditions for which sick leave may be granted. The complainant's argument in this regard fails.

In turning to the specific issues presented here, Case No. 96-0151-PC-ER presents the issue of whether respondent violated the FMLA in connection with the five-day suspension of complainant which was imposed from November 18-22, 1996. As concluded above, complainant failed to show that he was suffering from a "serious health condition" on August 20, October 3, or October 4, 1996, the dates of the unexcused absences which were relied upon in imposing the suspension. In fact, the record reflects that, as of these dates, complainant had not yet consulted Dr. Giesen about his back condition, and hadn't consulted EHS since May 29, 1992, at which time he was not experiencing back pain and Dr. Hla concluded that he showed perfectly normal movement and there was no evidence of back strain or injury. Although complainant contends that these absences were due to lower back pain, the record does not show that this was the information he provided to respondent at the time of the absences or at any time prior to the imposition of the suspension. In fact, the memo imposing the suspension indicated that complainant had refused to answer questions about his absences during the pre-disciplinary meeting, and the written information he provided after the meeting did not provide any mitigating information concerning these unscheduled absences. From this, it is concluded that respondent was justified in not treating complainant's requests for leave on August 20, October 3, or October 4, 1996, as requests for leave under the FMLA, and that complainant has failed to show that the condition for which he requested leave on these dates qualified as a serious health condition within the meaning of the FMLA. As a consequence, the reliance by

respondent upon these absences as bases for the imposition of the subject suspension did not violate the FMLA.

The issue in Case No. 97-0046-PC-ER is whether respondent violated the FMLA with respect to its denial of complainant's request for FMLA leave for his November 26, 1996, absence. The record here shows that the only contact complainant had with a health care provider regarding this absence was a phone contact with Dr. Giesen on November 27, 1996, and that this was his first contact with Dr. Giesen relating to his lower back pain. This phone contact did not involve any direct and firsthand contact, and did not result in a recommendation for any follow-up treatment or supervision. In addition, the record shows that complainant did not have any contact with EHS regarding this absence and had not had any direct and firsthand contact with EHS regarding his lower back pain condition since May 29, 1992, at which time Dr. Hla concluded that complainant showed perfectly normal movement with no pain and that there was no evidence of back strain or injury. Finally, the information provided by Dr. Giesen pursuant to complainant's request (see Finding of Fact 14, above) does not support a conclusion that, on November 26, 1996, complainant was suffering from a disabling condition within the meaning of the FMLA. As a result, complainant, as concluded above, has failed to show that the condition resulting in this absence qualified as a serious health condition within the meaning of the FMLA, and, as a result, has failed to show that respondent violated the FMLA when it denied complainant's request for FMLA leave for this absence.

In Case No. 97-0074-PC-ER, the first issue is whether respondent violated the FMLA by denying complainant's request for FMLA coverage for his absences on January 27-28, 1997. As concluded above, complainant has failed to show that the condition upon which he based these requests for leave, i.e., his lower back condition, qualified as a serious health condition within the meaning of the FMLA. Moreover, complainant has failed to show that respondent should have interpreted his request for leave for these absences as a request under the FMLA. Specifically, in regard to his November 26, 1996, absence, complainant requested, completed, and submitted the

forms used by respondent for processing FMLA requests. It would follow as a result that respondent would reasonably expect complainant to request, complete, and submit such forms were he to request FMLA leave at some time after November 26, 1996; and would not reasonably be expected to regard a subsequent request for leave not accompanied by completed FMLA forms as a request for FMLA leave. Complainant did not do this for the absences on January 27 and 28, 1997.

The second issue in Case No. 97-0074-PC-ER is whether respondent retaliated against the complainant for exercising rights protected by the FMLA or for engaging in protected fair employment activities when it discharged him effective May 13, 1997. In order to establish a prima facie case of retaliation, complainant must show that he engaged in a protected activity, the employer subsequently took an adverse action against him, and a causal link exists between the protected activity and the adverse action. *Acharya v. Carroll*, 152 Wis. 2d 330, 448 N.W.2d 275 (Ct. App. 1989). By filing an FMLA request and by filing two actions with the Commission, complainant has shown that he engaged in protected activities under both the FMLA and the Fair Employment Act (FEA). Complainant has also satisfied the second element by showing that respondent subsequently took an adverse action, i.e., a termination action, against him. Finally, a casual connection is inferred from the relatively close juxtaposition in time of the protected activities and the termination. Complainant has established a prima facie case of retaliation. The reason offered by respondent for complainant's termination is his failure to comply with respondent's attendance policy. This reason is legitimate and non-retaliatory on its face

The burden then shifts to complainant to show pretext. Under the facts present here, complainant could demonstrate pretext by showing that respondent treated him differently than other similarly situated employees in applying its attendance policy in reaching the subject decision. Although complainant asserts that pretext could also be demonstrated by a showing that respondent treated him differently after he engaged in the protected activities than it had before, this contention is not as straightforward as complainant suggests. Specifically, a review of respondent's practice in applying its

attendance policy shows that the policy is applied more rigorously the further along an employee is on the disciplinary track. Thus, a difference in the manner in which the attendance policy is applied to a particular employee when a five-day suspension is imposed, as opposed to the manner in which it is applied to this employee when he is terminated, would be expected and would not, therefore, necessarily indicate a retaliatory motive was responsible for the difference. Hence, the fact that complainant's EHS excuses were accepted to excuse absences prior to his protected activities, i.e., when his reprimands and suspensions were imposed, but not when he was terminated, does not necessarily demonstrate that a retaliatory motive played a part in the termination. The record here shows that respondent relied upon three unscheduled absences to terminate complainant, i.e., the absences of November 26, 1996, and January 27 and 28, 1997. Although complainant presented medical excuses for the absences of November 26 and January 28, these excuses indicated that they were issued based on information self-reported by complainant and were generated after the date of the absence. Not excusing an absence based on these facts would appear to be consistent with the manner in which respondent treated other apparently similarly situated employees (See Findings of Fact 22.(d) and 22.(f), above). In regard to the absence of January 27, complainant failed to show that the excuse generated by Dr. Hla for this absence (See Finding of Fact 15.(b), above) was ever provided to his supervisors. In fact, in the written information provided to Mr. Baez and Mr. Scheuer after the May 8, 1997, pre-termination meeting, complainant mis-characterizes the January 27 EHS excuse as an excuse from respondent's Emergency Department and indicates that EHS was trying to locate the ED excuse and Mr. Baez and Mr. Scheuer should try to get a copy of it from EHS. The record does not show that it was Mr. Baez's practice or the general practice of other supervisors to request medical documentation from the EHS. The record does show, however, that it was not uncommon for supervisors not to excuse an absence based on an EHS excuse; and, in regard to an employee who was at the potential termination stage of the disciplinary track, even a note from a treating physician which did not provide sufficiently specific

information relating to the employee's diagnosis and prognosis may not be accepted (See, e.g., Finding of Fact 22.(d), above). Even if complainant had provided a copy of the January 27 EHS excuse to his supervisors, he has failed to show that respondent's failure to excuse his absence based on this excuse was inconsistent with the practice they had followed in relation to other similarly situated employees. The record shows that it was not inconsistent with the practice followed in regard to employees at the potential termination stage of the disciplinary track for respondent not to excuse an absence based on an excuse provided by EHS. Complainant contends that the disciplinary records of the other employees offered for comparison purposes in the hearing record shows that complainant was treated differently than other similarly situated employees but fails to specify the nature of this differential treatment and it is not apparent from a review of these records (See Finding of Fact 22, above). Complainant has failed to show pretext.

The record here presents a picture of an employee who had chronic attendance problems over a lengthy period of time. It stands to reason, and the record shows, that it is respondent's practice to require more rigorous scrutiny of an employee's proferred excuses for absences as he proceeds further along on the progressive disciplinary track. Complainant was aware of this. Complainant has not shown that respondent's failure to excuse his absences, while he was at the tail end of the disciplinary track, based on self-reporting and excuses provided by non-treating health care providers was either *per se* unreasonable or was in conflict with the practice respondent followed in regard to employees at the same point in the disciplinary track as complainant. It is important to note here that the subject termination decision is not being reviewed here to determine whether there was just cause for the action, but to determine whether the action resulted from retaliation. The record simply does not support a conclusion that complainant's termination resulted from anything other than complainant's lengthy and continuing history of attendance problems. Complainant has failed to sustain his burden on the retaliation issue.

ORDER

This complaint is dismissed.

Dated: August 18, 1998

STATE PERSONNEL COMMISSION

LAURIE R. McCALLUM, Chairperson

DONALD R. MURPHY, Commissioner

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.) 2/3/95