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STATE OF WISCONSIN

CIRCUIT COURT
BRANCH 8

DANE COUNTY

STEVEN G. BUTZLAFF,
Plaintiff,

V.

Case No. 97 CV 1319

STATE OF WISCONSIN DEPARTMENT OF
HEALTH AND FAMILY SERVICES,
Defendant.

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DECISION AND ORDER

PERSONNEL COMMISSION

BACKGROUND

This is before the court on State of Wisconsin Department of Health and Family Services' (Defendant's) motion to dismiss. Steven G. Butzlaff (Plaintiff) brought this action alleging violation of Wisconsin's Family and Medical Leave Act by Defendant. Defendant seeks to dismiss Plaintiff's claim on sovereign immunity. After review of the applicable law, I conclude that the motion to dismiss must be denied. My reasons follow.

FACTS

Plaintiff was fired from his probationary position as a Security Officer 3 at the Mendota Mental Health Institute on May 2, 1990. On June 15, 1990, he filed a complaint with the State of Wisconsin Personnel Commission alleging that he was fired in violation of the Family Medical Leave Act (FMLA), §103.10 Wis. Stats. The Commission granted Defendant's motion to dismiss the complaint on the grounds that Plaintiff had not been on the job long enough to be protected by FMLA. That decision was reversed and remanded to the

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PERSONNEL COUNSEL

Commission for a hearing on the merits following judicial review.¹ The Commission rendered its final decision on January 23, 1996, denying Plaintiff's complaint, and Plaintiff filed a petition for review. The Honorable Richard J. Callaway rendered his decision, affirming the Commission's decision, on March 19, 1997. Plaintiff filed this action on May 14, 1997.

STANDARD OF REVIEW

Motions to dismiss are governed by Wis. Stats. §802.06(2), (1993). The purpose of the motion is to test the sufficiency of the complaint. Anderson v. Continental Ins. Co., 85 Wis. 2d 675, 683, 271 N.W.2d 368, (1978). The allegations of the claim itself are used to determine whether a claim has been stated for which relief can be granted. Jenkins v. Sabourin, 104 Wis.2d 309, 313, 311 N.W.2d 600 (1981). All the facts pled will be taken as true to determine whether there is a legal basis for recovery. State v. American TV, 146 Wis. 2d 292, 300, 430 N.W.2d 709 (1988) (citations omitted). Pleadings are to be liberally construed with a view toward substantial justice to the parties. §802.02(6), Stats.

DISCUSSION

Plaintiff has alleged violations of Wisconsin's Family and Medical Leave Act by Defendant. Defendant has moved to dismiss the claims on the basis of sovereign immunity. Plaintiff argues that the immunity defense has been waived through §103.10(13), Wis. Stats.

Under the doctrine of sovereign immunity, the state cannot be sued without its consent. Fiala v. Voight, 93 Wis. 2d 337, 342, 286 N.W.2d 824 (1980). Sovereign

¹Butzlaff v. Personnel Commission, 166 Wis. 2d 1028, 480 N.W.2d 559 (Ct. App. 1992).

immunity is a matter of personal jurisdiction that, when raised, deprives the trial court of jurisdiction over the state. Id. at 341. As the Supreme Court of Wisconsin stated in Lister v. Board of Regents, 72 Wis. 2d 282, 291, 240 N.W.2d 610 (1976):

The concept of sovereign immunity in this state derives from art. IV, sec. 27 of the Wisconsin constitution, which provides:

The legislature shall direct by law in what manner and in what courts suits may be brought against the state.

From this provision the rule developed that the state cannot be sued without its consent.

The immunity of the state extends to state agencies. Lister, 72 Wis. 2d at 291.

The motion to dismiss will therefore be granted, unless Defendant has consented to being sued.

Plaintiff states that Defendant has waived sovereign immunity under §103.10(13), Wis. Stats. Defendant states that the Legislature did not, through clear and express language, waive sovereign immunity so as to allow State employees to sue State agencies under §103.10(13), Stats., where the Personnel Commission has dismissed the administrative proceeding brought by that State employee on the merits. Section 103.10(13). states:

Civil Action. (a) an employe or the department may bring an action in circuit court against an employer to recover damages caused by a violation of sub. (11) after the completion of an administrative proceeding, including judicial review, concerning the same violation.

(b) An action under par. (a) shall be commenced within the later of the following periods, or be barred:

1. Within 60 days from the completion of an administrative proceeding, including judicial review, concerning the same violation.

2. Twelve months after the violation occurred, or the department or employe should reasonably have known the violation occurred.

The court is satisfied that the plain language of the statute, "an employe or the department may bring an action in circuit court against an employer to recover damages

caused by a violation of sub. (11) after the completion of an administrative proceeding, including judicial review, concerning the same violation," is express legislative permission to sue the state. There is no language in §103.10(13) that indicates that an administrative final order finding a violation of §103.10(11) is a prerequisite to filing a civil action. See, Kelley Co., Inc. v. Marquardt, 172 Wis. 2d 234, 255, 493 N.W.2d 68 (1992) (The FMLA does not state that a constructive discharge is a requirement for reinstatement or back pay.)

503

Accordingly, the court will allow the case to proceed.

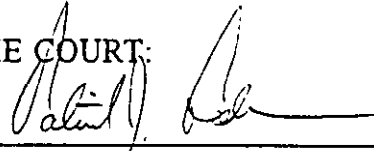
CONCLUSION

For the reasons set forth above, Defendants' motion to dismiss is DENIED.

IT IS SO ORDERED.

Dated this 3 day of September, 1997.

BY THE COURT:



Patrick J. Fiedler, Judge
Circuit Court, Branch 8

cc: Attorney Thomas Arnon Allen
AAG Richard B. Moriarty