COURT OF APPEALS
DECISION
DATED AND FILED

January 23, 2007

A. John Voelker
Acting Clerk of Court of Appeals

Appeal No. 2006AP1964-FT **Cir. Ct. No. 2006CV27**

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT III

KATHY BERG,

PETITIONER-APPELLANT,

V.

STATE OF WISCONSIN, DEPARTMENT OF WORKFORCE DEVELOPMENT, EQUAL RIGHTS DIVISION,

RESPONDENT-RESPONDENT,

GOLD-N-PLUMP,

RESPONDENT.

APPEAL from a judgment of the circuit court for Trempealeau County: JOHN A. DAMON, Judge. *Affirmed*.

Before Cane, C.J., Hoover, P.J., and Peterson, J.

¶1 PER CURIAM.[1] Kathy Berg appeals a judgment affirming a decision of the State of Wisconsin Department of Workforce Development Equal Rights Division (the Department) finding no probable cause to believe that Gold-n-Plump violated the Wisconsin Family and Medical Leave Act (WFMLA) when it terminated Berg's employment. Berg contends Gold-n-Plump violated the WFMLA by not allowing her to take leave consecutive to that provided by the Federal Family and Medical Leave Act (FFMLA). Specifically, Berg claims Gold-n-Plump violated the WFMLA by misleading her as to how much leave time she had under the respective statutes. We reject Berg's arguments and affirm.

¶2 The parties stipulated to the facts. Berg began employment with Gold-n-Plump on January 9, 1995. On August 25, 2004, Gold-n-Plump granted Berg medical leave for a serious health condition, namely breast cancer and reconstructive surgery due to the cancer. Berg remained on leave for the balance of 2004 and continuing through February 28, 2005. Gold-n-Plump sent Berg a letter on January 27, 2005, informing her that if she was unable to return to work on February 26, 2005, her employment would be terminated pursuant to a policy establishing a maximum period of time for a leave of absence of six months. Berg was not able to provide the medical documentation requested by Gold-n-Plump for a return to work on February 26, 2005. Berg's employment was terminated effective February 28, 2005.

¶3 Gold-n-Plump displayed a WFLMA poster setting forth employees' rights next to the supply room where all employees received their supplies daily.

[1] This is an expedited appeal under WIS. STAT. RULE 809.17. All references to the Wisconsin Statutes are to the 2003-04 version unless otherwise noted. References to the Wisconsin Administrative Code are to the Nov. 2006 version unless otherwise noted.

In April 2005, the poster was relocated next to the employee time clock during a painting project. Berg's only other information from Gold-n-Plump concerning her rights under the FFMLA or WFMLA was a document entitled "Notice to Employee of Rights and Obligations under the Family and Medical Leave Act" and a copy of Gold-n-Plump's Leave of Absence Policy. Berg did not ask Gold-n-Plump about her entitlement to leave under the WFMLA.

¶4 On March 29, 2005, Berg filed a complaint with the Equal Rights Division. After an initial investigation, the ERD investigator issued an initial determination of no probable cause. Berg appealed, and on January 11, 2006, the Department issued a decision finding no probable cause to believe that Gold-n-Plump violated the WFMLA when it terminated Berg. A petition for review was filed with the circuit court, which affirmed the Department's decision. Berg now appeals.

¶5 Even though this case is before us on appeal of a judgment of the circuit court, we are in reality reviewing the Department's decision interpreting the WFMLA. *See* ***Richland Sch. Dist. v. DILHR***, 174 Wis. 2d 878, 890, 498 N.W.2d 826 (1993). The Department's interpretations of the WFMLA are routinely accorded great weight deference because the Department has long administered the WFMLA and has expertise in interpreting its provisions. *See*, *e.g.*, ***Jicha v. DILHR***, 169 Wis. 2d 284, 290-93, 485 N.W.2d 256 (1992).

¶6 Berg insists "[a] review of the Family and Medical Leave Act section of the Department of Workforce Development's Decision Digest will show that the [WFMLA] has been relatively unlitigated[,]" and thus review should be de novo. We disagree. In ***Jicha***, the court based great weight deference on two grounds. First, the court decided the Department had gained experience and

expertise by engaging the rule-making process for WFMLA. In this regard, it is noteworthy that the ***Jicha*** court referred only to the rule-making process generally and did not rely on the rule-making process on the specific issue in that case. Second, the court concluded the Department had gained experience and expertise by interpreting a closely analogous statute. During its next term, in ***Richland School District***, 174 Wis. 2d at 890-94, the court confirmed the Department had sufficient experience and expertise simply by developing WFMLA regulations. The court thus applied the "great weight" standard, deferring to the Department's interpretation if that interpretation was reasonable. *See* ***id.*** In addition, the Department's interpretation of its own administrative rules are entitled to great weight unless such interpretation in "inconsistent with the language of the regulation or clearly erroneous." ***Plevin v. DOT***, 2003 WI App 211, ¶13, 267 Wis. 2d 281, 671 N.W.2d 355 (citation omitted).

¶7 The Department concluded that WIS. ADMIN. CODE §§ DWD 225.01(9) and (10) controlled the issue of whether Berg was misled about her rights under the WFMLA.[2] Pursuant to §§ DWD 225.01(9) and (10), if an employer grants leave relating to the employee's own health that is no more

[2] WISCONSIN ADMIN. CODE §§ DWD 225.01(9) and (10) provide as follows:

> (9) To the extent an employer grants leave to an employee relating to the employee's own health in a manner which is no more restrictive than the leave available to the employee under s. 103.10(4), Stats., the leave granted by the employer shall be deemed to be leave available to that employee under s. 103.10(4), Stats.
>
> (10) To the extent that leave granted by an employer to an employee is deemed by this subsection to be leave available to that employee under the act, the use of that leave granted by the employer shall be the use of that leave under the act.

restrictive than the leave available under WIS. STAT. § 103.10(4), the employer has met its duty under the WFMLA. Section 103.10(4) provides no employee may take more than two weeks of medical leave during a twelve-month period.

¶8 Berg contends that applying the phrase "12-month period" in WIS. STAT. § 103.10(4) is an issue of first impression. We are not persuaded. In fact, both federal and Wisconsin regulations establish twelve-month periods for when medical leave may be taken, but differ on what that time period means. 29 C.F.R. § 825.200(b) (1993), allows employers to choose between four methods of calculating twelve-month periods applicable to FFMLA leave.[3] However, these FFMLA rights are subject to exceptions required by State or local governments regarding their own leave provisions. *See* 29 C.F.R. § 825.200(d)(2). Berg concedes that comments to the FFMLA state that "employers operating in multiple States with differing State family/medical leave provisions affecting the 12-month calculation must follow the method required by the State laws." *See* 29 C.F.R. § 825.200, *Summary of Major Comments*, 60 Fed. Reg. 2180-01, 2199-2200 (1995).

¶9 WISCONSIN STAT. § 103.10(4) provides no employee may take more than two weeks of medical leave during a twelve-month period. WFMLA regulations require that twelve-month periods governing WFMLA leaves are calendar years. WIS. ADMIN. CODE § DWD 225.01(1)(m). Accordingly, Wisconsin Gold-n-Plump employees were governed by a calendar year method regarding any WFMLA leave time.

[3] Gold-n-Plump, operating in Wisconsin and other states, exercised its FFMLA right to choose a rolling calendar method.

¶10 The Department concluded that because the maximum leave available under WIS. STAT. § 103.10(4) was two weeks in each calendar year, and Berg had received twenty-six consecutive weeks of leave including at least two weeks within each calendar year (2004 and 2005), there was no probable cause to believe that Gold-n-Plump had violated the WFMLA. Indeed, the Department noted that Berg not only received all the WFMLA leave to which she was entitled, she was allowed far more leave in both 2004 and 2005 than allowed under the WFMLA.

¶11 The Department further reasoned that because the leave granted by Gold-n-Plump, pursuant to WIS. ADMIN. CODE § DWD 225.01(9), was no more restrictive than the leave available under WIS. STAT. § 103.10(4), it was then accordingly also "deemed to be leave available to that employee under the act" as referenced in § DWD 225.01(10). As a result, the Department concluded "it is irrelevant whether the leave granted is counted by the employer as concurrent or consecutive with any other leave (be it the employer's own medical leave, any other type of employer leave, federal FMLA leave or otherwise)." Department regulations directed the leave was deemed medical leave under the WFMLA and Berg had received the full benefit of her entitlement to medical leave under the WFMLA in 2004 and 2005.

¶12 Berg acknowledges the WFMLA requires only a posting, in one or more conspicuous places, of a notice in a form approved by the Department setting forth the employees' rights under the WFMLA. *See* WIS. STAT. § 101.10(14). Berg further concedes this notice requirement was met by Gold-n-Plump's WFMLA poster displayed next to the supply room. In fact, Berg even states in her brief that the explanation in Gold-n-Plump's Leave of Absence Policy "is fairly straight forward." Nevertheless, Berg insists that "Gold-n-Plump violated the

spirit of the WFMLA" by providing a Notice to Employee of Rights and Obligations under the Family and Medical Leave Act which does not mention that "an alternative definition of the '12 month period' may be applicable to Wisconsin employees." This argument cannot be sustained.

¶13 The Department considered it significant that Gold-n-Plump's "Policy" regarding leaves of absences contained the following statement:

> If applicable local, state or federal laws require a leave of absence under circumstances other than those provided in this policy, those laws shall govern.

In addition, the Department noted that Gold-n-Plump's policy regarding "Medical Leave/Family and Medical Leave" provided the following:

> The provisions of this Family and Medical Leave Policy are intended to comply with applicable law, including the Family and Medical Leave Act of 1993 (FMLA) and applicable regulations. … To the extent that this policy is ambiguous or contradicts applicable law, the language of the applicable law will prevail.

¶14 The Department concluded Gold-n-Plump's policy indicated that the provisions of its Family and Medical Leave Policy were intended to comply with applicable law, and while it specifically mentioned that it included the FFMLA and applicable regulations,

> it is concluded that the Respondent's policy was not limiting itself to compliance with the federal FMLA. It is a fair reading of the Respondent's policy to conclude that if the Respondent's policy was ambiguous or contradicted applicable law (including state law), then the applicable law (including state law) would prevail.

¶15 We agree that Berg was not misled and that Gold-n-Plump met its duty under the WFMLA. As the Department indicated, it is unfortunate that Berg's leave was exhausted pursuant to Gold-n-Plump's policy establishing a

maximum six-month period of time for a leave of absence. However, the Department's interpretation of the WFMLA is reasonable and Berg has not shown the Department's interpretations of its regulations are inconsistent with the language of the WFMLA or clearly erroneous.

By the Court.—Judgment affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5.