COURT OF APPEALS
DECISION
DATED AND FILED

August 18, 1998

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

No. 97-1616

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

SUSAN K. FRENZ,

PETITIONER-APPELLANT,

V.

STATE OF WISCONSIN DEPARTMENT OF WORKFORCE DEVELOPMENT, EQUAL RIGHTS DIVISION AND SINAI SAMARITAN MEDICAL CENTER,

RESPONDENTS-RESPONDENTS.

APPEAL from an order of the circuit court for Milwaukee County: ARLENE D. CONNORS, Judge. *Affirmed.*

Before Wedemeyer, Schudson and Curley, JJ.

PER CURIAM. Susan F. Frenz appeals from the circuit court order affirming the decision and order of the Wisconsin Department of Workforce

Development, Equal Rights Division, (Department),[1] concluding that Sinai Samaritan Medical Center (Sinai) had not violated § 103.10, STATS., the Wisconsin Family and Medical Leave Act (FMLA). In its decision and order, the Department determined that there was no probable cause to believe that Sinai violated the FMLA when it discharged Frenz after she refused to work on-call hours in addition to her regular-shift hours. Frenz claims that the Department erred in concluding that she failed to meet her burden of establishing, at the hearing before the Department, that she had a "serious medical condition" which rendered her unable to perform her employment duties, i.e., working the requested on-call hours with the lifting and standing associated with those hours. We affirm.

I. BACKGROUND

Frenz was employed by Sinai from 1978 until her dismissal on December 6, 1995. At the time of her dismissal, she was the Specialty Coordinator for Sinai's Department of Anesthesia.

On November 22, 1995, Frenz saw Dr. Joseph F. Davies for paracervical muscle spasms that had aggravated the degenerate disc disease with which she had been diagnosed in 1988. During the November 22, 1995 examination, Dr. Davies prescribed a muscle relaxant, Tylenol No. 3, three weeks

[1] The Department of Workforce Development explains:

> Shortly before the Department issued its decision in September 1996, its name was changed … from the Wisconsin Department of Industry Labor and Human Relations (DILHR) to the Wisconsin Department of Workforce Development.

See 1995 Wis. Act 289, § 275.

of physical therapy, and a cervical collar. At about the same time, Sinai had a staffing shortage in the Anesthesia Department and, as a result, Frenz's supervisor, Jean Tetzlaff, required her to work and be available for substantial on-call hours. Frenz refused, stating that she was neither mentally nor physically capable of working those hours. Later that day, Frenz was terminated for insubordination.

Following her termination, Frenz filed a complaint with the Equal Rights Division of the Department of Workforce Development, alleging that Sinai had violated the Wisconsin Family and Medical Leave Act, § 103.10(4), STATS.,[2] when it discharged her after she requested a medical leave because of her "serious health condition." The Department's Initial Determination, issued February 12, 1996, found no probable cause to believe that Sinai had violated the FMLA and dismissed the complaint. Frenz appealed. On June 14 and July 2, 1996, a hearing was held before an administrative law judge (ALJ). At the conclusion of the hearing, the ALJ found:

> 1. Sinai Samaritan is an enterprise … which provides health care services . . . .

[2] Section 103.10(4), STATS., provides, in pertinent part:

> [A]n 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.

In her complaint, Frenz also alleged that Sinai violated the FMLA by failing to post notices required by § 103.10(14), STATS. At the conclusion of the hearing, the Department dismissed the notice-posting claim because it concluded that Frenz had not presented any evidence supporting it. Frenz has not challenged the dismissal of that claim.

> 2. In 1995, the supervisor of the Department of Anesthesia at Sinai Samaritan was Jean Tetzlaff.
>
> 3. Sinai … hired Ms. Frenz on November 13, 1978. Ms. Frenz worked full time for Sinai … on a continuous basis from then until December 6, 1995. In 1995, Ms. Frenz worked as a Specialty Coordinator in the Department of Anesthesia. When Sinai … hired Ms. Frenz for that position, they [sic] promised her that she would not have to work on-call hours. Sinai … did not require Ms. Frenz to work on-call hours prior to December 6, 1995.
>
> 4. As of December 6, 1995, Ms. Frenz did not have any physical condition for which she was receiving continuing medical treatment.
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> 5. By December 6, 1995, the Department of Anesthesia was greatly understaffed. Two employes of the Department of Anesthesia had to divide between them the on-call hours (week nights and weekends) so that there would be twenty-four hour coverage. Employes on call could be called at any time and could have to work for twenty-four hours straight if needed.
>
> 6. Ms. Tetzlaff temporarily changed Ms. Frenz's job duties to include working on-call hours as of December 6, 1995, in response to the staffing crises. Ms. Frenz was trained for, and capable of doing, the work which was required of these employes on call.
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> 7. Ms. Tetzlaff had three meetings on December 6, 1995, with Ms. Frenz about working on-call hours. During the first meeting Ms. Tetzlaff requested that Ms. Frenz agree to take on-call hours. During the second meeting Ms. Tetzlaff told Ms. Frenz that taking on-call hours was expected and she strongly suggested that Ms. Frenz needed to take those additional hours to be part of the team.
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> 8. Ms. Frenz did not agree to take on-call hours during any of the three meetings on December 6, 1995.
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> 9. On December 6, 1995, Ms. Tetzlaff decided, after consulting with her supervisors, to discharge Ms. Frenz for not being willing to agree to take on-call hours.

The ALJ concluded that: (1) Frenz did not have a "serious health condition" that made her unable to perform her employment duties on December 6, 1995; (2) Frenz did not request medical leave on December 6, 1995; and (3)

Frenz failed to establish probable cause to believe that Sinai violated the FMLA. The ALJ then dismissed the complaint with prejudice.

On October 21, 1996, Frenz petitioned the circuit court for review of the Department's decision. The circuit court found that "Frenz did not establish probable cause of an FMLA violation at her hearing." Having concluded that Frenz was not entitled to the protection of the FMLA, the court declined to address the other issues raised by the parties and affirmed the Department's dismissal of Frenz's complaint.

II. ANALYSIS

Our supreme court has summarized the appropriate standards of review of an agency's legal and statutory interpretation:

> This court has generally applied three levels of deference to conclusions of law and statutory interpretation in agency decisions. First, if the administrative agency's experience, technical competence, and specialized knowledge aid the agency in its interpretation and application of the statute, the agency determination is entitled to "great weight." The second level of review provides that if the agency decision is "very nearly" one of first impression it is entitled to "due weight" or "great bearing." The lowest level of review, the *de novo* standard, is applied where it is clear from the lack of agency precedent that the case is one of first impression for the agency and the agency lacks special expertise or experience in determining the question presented.

Jicha v. DILHR, 169 Wis.2d 284, 290-91, 485 N.W.2d 256, 258-59 (1992) (citations omitted). In the instant case, the Department's decision should be accorded "great weight" because of its expertise and experience in reviewing, analyzing, and applying § 103.10, STATS., to facts similar to those presented on appeal. *See* ***Richland Sch. Dist. v. DILHR***, 174 Wis.2d 878, 891-92, 498 N.W.2d 826, 831 (1993); *see also* ***Jicha***, 169 Wis.2d at 292-93, 485 N.W.2d at 259.

"Where the facts are contested, the agency's findings of fact are conclusive unless the reviewing court determines that the findings are not supported by substantial evidence in the record." ***Sieger v. Wisconsin Personnel Comm'n***, 181 Wis.2d 845, 855, 512 N.W.2d 220, 223 (Ct. App. 1994); *see also* § 227.57(6), STATS. Substantial evidence is "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." ***Gilbert v. Medical Examining Bd.***, 119 Wis.2d 168, 195, 349 N.W.2d 68, 80 (1984) (internal quotation marks and quoted source omitted). A reviewing court must affirm the Department's findings if there is any substantial and credible evidence in the record to support those findings, and in reviewing the sufficiency of credible evidence, the reviewing court need only determine that the evidence is sufficient to exclude speculation or conjecture. *See* ***L & H Wrecking v. LIRC***, 114 Wis.2d 504, 508, 339 N.W.2d 344, 346 (Ct. App. 1983).

On appeal, Frenz argues that "the [Department] … erred in finding that Frenz failed to provide evidence of her 'serious health condition' in satisfaction of Wisconsin's [FMLA]."[3] (Bold type and capitalization omitted.) In response, the Department asserts that Frenz's failure to challenge any of its other factual findings coupled with her failure to challenge many of its legal conclusions obviates the need for this court to address the issue of whether the Department erred in finding that she failed to provide evidence of her "serious health condition." The Department explains:

> Proving that, on December 6, 1995, she had a "serious health condition" within the meaning of § 103.10(1)(g),

[3] On appeal to this court, Frenz also argues that the circuit court erred in finding that she had failed to provide evidence of her serious health condition. In review proceedings under Chapter 227, this court examines the Department's decisions without deference to the circuit court. *See* § 227.57, STATS.

> Stats., was only one of several essential elements of her claim, which the Department concluded, Frenz had failed to prove, but Frenz did not, on appeal, challenge the conclusions of the Department regarding these other essential elements.

The Department is correct.

"Section 103.10(11)(a), STATS.,[4] creates a cause of action against employers who violate FMLA by wrongfully denying medical leave." ***Sieger***, 181 Wis.2d at 860, 512 N.W.2d at 225 (footnote added).

> [T]o successfully assert that an employer wrongfully denied the employe medical leave, the employe must prove that (1) the employe had a serious health condition (2) that rendered the employe unable to perform the employe's work duties during the requested leave, (3) that the leave was medically necessary and (4) that the employe requested the planned medical leave in a reasonable manner.

Id. at 861, 512 N.W.2d at 225. The employee bears the burden of proof at the hearing to establish that he or she was entitled to medical leave under FMLA. *See* ***id.*** at 860, 512 N.W.2d at 225.

On appeal, the only issue Frenz has properly presented to this court is whether the Department correctly concluded that she failed to prove that she had a "serious health condition." Thus, she has neither disputed the evidentiary sufficiency of the Department's factual findings nor challenged the Department's other legal conclusions.

In her brief to this court, Frenz did not challenge: (1) the Department's conclusion that she failed to prove that she had a serious health condition *which made her unable to perform her employment duties*; (2) the

[4] Section 103.10(11)(a), STATS., provides:

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

Department's conclusion that *she failed to prove that Sinai would have allowed her to take leave under the FMLA in increments shorter than full workdays*;[5] and (3) the Department's conclusion that *she failed to prove she made a proper request for medical leave*. Thus, even if we agreed with Frenz's limited argument on appeal, we could not reverse the Department's decision because she has failed to address or challenge the Department's other three legal conclusions, any one of which is dispositive. Accordingly, although we appreciate the understandable criticism of Sinai's conduct in this matter—voiced by both the ALJ and the circuit court—we must affirm. *See* ***Schlieper v. DNR***, 188 Wis.2d 318, 321-23, 525 N.W.2d 99, 101-02 (Ct. App. 1994) (where appellant pursues a theory without addressing the rationale on which the challenged decision turns, the validity of that rationale is confessed by the appellant and the decision may be affirmed without consideration of the appellant's theory).

By the Court.—Order affirmed.

This opinion will not be published. *See* Rule 809.23(1)(b)5, Stats.

[5] In its "Conclusions of Law," the Department found that Frenz had also failed to prove that Sinai allowed employees to take non-emergency leave in increments of less than a full workday within the meaning of WIS. ADM. CODE § IND 86.02(1) (1989).