COURT OF APPEALS
DECISION
DATED AND FILED

December 14, 1999

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

No. 98-2119

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

SINAI SAMARITAN MEDICAL CENTER, INC.,

PETITIONER-APPELLANT,

V.

DEPARTMENT OF WORKFORCE DEVELOPMENT, EQUAL RIGHTS DIVISION AND JEREMY KARMAN,

RESPONDENTS-RESPONDENTS.

APPEAL from an order of the circuit court for Milwaukee County: VICTOR MANIAN, Judge. *Affirmed.*

Before Wedemeyer, P.J., Fine and Schudson, JJ.

¶1 WEDEMEYER, P.J. Sinai Samaritan Medical Center, Inc., appeals from an order affirming the decision of the Department of Workforce Development (DWD) regarding Jeremy Karman's complaint that Sinai Samaritan,

his employer, violated the Wisconsin Family and Medical Leave Act, § 103.10, STATS. (WFMLA). Sinai Samaritan claims DWD erred when it rejected Sinai Samaritan's claim that WFMLA is preempted by the Employee Retirement Income Security Act (ERISA). Because Karman's claim under WFMLA is not preempted by ERISA, we affirm.

BACKGROUND

¶2 Karman is a physical therapist who began working for Sinai Samaritan on May 9, 1994. In November 1997, he requested family leave in connection with the birth of a child. He also requested to substitute accrued paid sick time for his unpaid leave. The leave request was granted, but Karman was informed that he would not be permitted to substitute paid sick time for unpaid family leave because he was not sick. Sinai Samaritan contended that because the sick pay benefits are paid under the Aurora Health Care, Inc., Sick Pay Plan, which qualifies as a welfare benefit plan under ERISA, WFMLA, which would allow the substitution of paid sick time for unpaid time, is preempted.

¶3 Karman proceeded to file a complaint with DWD, claiming that Sinai Samaritan's refusal to substitute his accrued paid sick time for his unpaid leave constituted a violation of WFMLA by "interfering with, restraining or denying the exercise of a right under [WFMLA]." A hearing was conducted and the Administrative Law Judge (ALJ) concluded that Sinai Samaritan had violated WFMLA, and that Karman was entitled to $1,768.80, which represents the amount he should have received if Sinai Samaritan had granted his request to substitute accrued paid sick time for his unpaid leave. The ALJ concluded that the provision of WFMLA that allows substitution of paid sick time is not preempted by ERISA.

¶4 Sinai Samaritan appealed to the circuit court, which affirmed DWD, concluding that "Congress did not intend ERISA preemption of more generous State family and medical leave law provisions." Sinai Samaritan now appeals.

DISCUSSION

¶5 There are two issues in this appeal. The first is whether our standard of review should be *de novo*, as argued by Sinai Samaritan, because DWD has no special expertise in determining whether ERISA preempts WFMLA, or whether we should afford DWD's decision due weight deference as argued by DWD. We decline to resolve the dispute over the standard of review because, under either standard, we must affirm.

¶6 The second issue is whether WFMLA is preempted by ERISA. Sinai Samaritan argues that because the sick pay plan at issue here qualifies as an employee welfare benefit plan under ERISA, and the provisions of WFMLA relate to an ERISA-covered plan and purport to regulate the ERISA plan, WFMLA is preempted. Karman responds that in passing the federal Family and Medical Leave Act, Congress clearly indicated that its passage was intended to insulate State family and medical leave provisions from all federal preemption.

¶7 In deciding this case, we are bound by a recent pronouncement from this court where the identical issue was addressed and decided in favor of DWD. In ***Aurora Medical Group v. Department of Workforce Development***, ___ Wis.2d ___, 602 N.W.2d 111 (Ct. App. 1999), we concluded that the passage of the federal Family and Medical Leave Act evinced an intent to "insulate State family and medical leave provisions from all federal preemption." ***Id.*** at ___, 602 N.W.2d at 115. We explained: "to the extent to which ERISA is amended by [the federal Family and Medical Leave Act], ERISA must yield to any provisions of

WFMLA providing greater family leave rights than those provided by [the federal Family and Medical Leave Act]." ***Id.*** at ___, 602 N.W.2d at 114.

¶8 In ***Aurora***, we set forth the pertinent parts of the congressional record discussing the passage of the federal Family and Medical Leave Act and how it affected ERISA preemption laws. *See* ***id.*** at ___, 602 N.W.2d at 114-16. We concluded that the employee's WFMLA claim was not preempted by ERISA. *See* ***id.*** at ___, 602 N.W.2d at 116.

¶9 The facts surrounding Karman's claim are nearly identical to the facts surrounding the employee's claim in ***Aurora***. Therefore, in accord with ***Aurora***, we reach the same conclusion in the instant case. Karman's claim is not preempted by ERISA, and he is entitled to substitute his paid sick time for unpaid statutory family leave.

By the Court.—Order affirmed.

Not recommended for publication in the official reports.

No. 98-2119(C)

¶10 FINE, J. *(concurring).* I agree with the majority that this case is controlled by ***Aurora Medical Group v. Department of Workforce Development***, ___ Wis.2d ___, 602 N.W.2d 111 (Ct. App. 1999). *See* § 752.41(2), STATS. ("Officially published opinions of the court of appeals shall have statewide precedential effect."). I write briefly to point out why I believe that ***Aurora*** is wrong and violates the Supremacy Clause of the United States Constitution.[1]

¶11 There is no doubt but that if the federal Family and Medical Leave Act had not been enacted, Wisconsin's Family and Medical Leave Act would be preempted both in ***Aurora*** and here by the federal Employee Retirement Income Security Act. ***Aurora*** concedes that point, which is based on the supremacy of federal law. But, ***Aurora*** tells us, the federal Family and Medical Leave Act blocked that preemption—thus leaving Wisconsin's Family and Medical Leave Act free rein to set the rules.

¶12 On what does ***Aurora*** base its view that the federal Family and Medical Leave Act blocks the Employee Retirement Income Security Act's preemption? Certainly not the language of the federal Family and Medical Leave Act, because that language does not do that. I quote from ***Aurora***'s analysis:

> FFMLA [the federal Family and Medical Leave Act] states: "Nothing in this Act *or any amendment made by this Act* shall be construed to supersede any provision of

[1] A copy of ***Aurora Medical Group v. Department of Workforce Development***, ___ Wis.2d ___, 602 N.W.2d 111 (Ct. App. 1999), is attached as an exhibit to this opinion. As luck of the draw would have it, I was a member of the publication committee that decided to order ***Aurora*** be published. *See* RULE 809.23, STATS. In my view, members of the publication committee should apply the criteria specified in RULE 809.23(1), STATS., and not their views on whether an opinion is correct or not correct. Accordingly, I voted that ***Aurora*** be published even though I believe that it is wrong.

> any State or local law that provides greater family or medical leave rights than the rights established under this Act or any amendment made by this Act." 29 U.S.C. § 2651(b) (1998) (emphasis added). FFMLA [the federal Family and Medical Leave Act] also states that "[t]he rights established for employees *under this Act or any amendment made by this Act* shall not be diminished by any ... employment benefit program or plan." 29 U.S.C. § 2652(b) (1998) (emphasis added). Therefore, to the extent to which ERISA [the Employee Retirement Income Security Act] is amended by FFMLA [the federal Family and Medical Leave Act], ERISA [the Employee Retirement Income Security Act] must yield to any provisions of WFMLA [the Wisconsin Family and Medical Leave Act] providing greater family leave rights than those provided by FFMLA [the federal Family and Medical Leave Act].

Aurora, ___ Wis.2d at ___, 602 N.W.2d at 114 (underlining added) (see attached exhibit at 4–5). If, as ***Aurora*** posits in the text that I've underlined, the federal Employee Retirement Income Security Act *had been* amended by the federal Family and Medical Leave Act to preserve state laws against preemption by the Employee Retirement Income Security Act, ***Aurora*** would be correct. But, the Employee Retirement Income Security Act was *not* amended by the federal Family and Medical Leave Act—at least not by Congress.

¶13 The section upon which ***Aurora*** relied to conclude that the federal Family and Medical Leave Act blocked preemption by the Employee Retirement Income Security Act is 29 U.S.C. § 2651(b): "Nothing in this Act or any amendment made by this Act shall be construed to supersede any provision of any State or local law that provides greater family or medical leave rights than the rights established under this Act or any amendment made by this Act."[2] Let's look

[2] 29 U.S.C. § 2651 (1998), provides, in full:

> Effect on other laws
>
> (a) Federal and State antidiscrimination laws

(continued)

at this provision. The "Act" referred to in the phrase "Act or any amendment made by this Act" is the federal Family and Medical Leave Act. That is what the word "this" means. So, § 2651(b) thus says that nothing in the federal Family and Medical Leave Act "shall be construed to supersede any provision of any State or local law that provides greater family or medical leave rights than the rights established under" the federal Family and Medical Leave Act "or any amendment made by" the federal Family and Medical Leave Act. Section 2651(b) says *nothing* about the Employee Retirement Income Security Act. Section 2651(b) also says that the "rights established under" the federal Family and Medical Leave Act do not override state laws that provide greater rights than does the federal

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> Nothing in this Act or any amendment made by this Act shall be construed to modify or affect any Federal or State law prohibiting discrimination on the basis of race, religion, color, national origin, sex, age, or disability.
>
> (b) State and local laws
>
> Nothing in this Act or any amendment made by this Act shall be construed to supersede any provision of any State or local law that provides greater family or medical leave rights than the rights established under this Act or any amendment made by this Act.

The Congressional Research Service of The Library of Congress told the House Committee on Education and Labor in a letter dated January 29, 1993, that what became the federal Family and Medical Leave Act did not affect preemption of state law by the Employee Retirement Income Security Act:

> In conclusion, the Family Leave bill expressly disclaims any intent to alter or amend the relevant state and local family leave laws. ERISA [the Employee Retirement Income Security Act], however, would continue to preempt those laws insofar as they relate to any employee benefit plans. Our analysis reveals nothing in the bill that can be read to supersede the preemption provisions of ERISA [the Employee Retirement Income Security Act] with respect to state laws relating generally to employee benefit plans, or specifically to continuation or conversion rights.

139 CONG. REC. H396, *H414 (Feb. 3, 1993).

Family and Medical Leave Act. Again, it says nothing about preemption of state law by the federal Employee Retirement Income Security Act.

¶14 Faced with the unambiguous language of the federal Family and Medical Leave Act, which, as we have seen, says *nothing* about preemption of state law *by* the federal Employee Retirement Income Security Act, ***Aurora*** was an easy case: clear language of a statute controls, whether we like it or not. *See* ***Department of Natural Resources v. Wisconsin Power & Light Co.,*** 108 Wis.2d 403, 408, 321 N.W.2d 286, 288 (1982) (must apply plain meaning of statutory language that is clear). But ***Aurora*** chose to apply not the language but some "legislative history" crafted by some senators and staffers who wanted the federal Family and Medical Leave Act to do what the Act did not do.

¶15 "Judge Harold Leventhal used to describe the use of legislative history as the equivalent of entering a crowded cocktail party and looking over the heads of the guests for one's friends." ***Conroy v. Aniskoff***, 507 U.S. 511, 519 (1993) (Scalia, J., concurring). When the "friends" who make up "legislative history" in a way to countermand the statute's language include the state's two United States Senators, their siren call to ignore what the statute says in favor of what they wish it might have said becomes particularly hard to resist. Unfortunately for ordered justice, ***Aurora*** did not resist. But, since ***Aurora*** is dispositive on this issue, "ordered justice" requires that I go along.

COURT OF APPEALS
DECISION
DATED AND FILED

September 7, 1999

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. *See* § 808.10 and RULE 809.62, STATS.

No. 98-1546

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

AURORA MEDICAL GROUP,

PETITIONER-APPELLANT,

v.

DEPARTMENT OF WORKFORCE DEVELOPMENT, EQUAL RIGHTS DIVISION AND KRISTINE E. MEYERS,

RESPONDENTS-RESPONDENTS.

APPEAL from an order of the circuit court for Milwaukee County: VICTOR MANIAN, Judge. *Affirmed.*

Before Wedemeyer, P.J., Schudson and Curley, JJ.

¶16 SCHUDSON, J. Aurora Medical Group appeals from the circuit court order affirming the Department of Workforce Development's decision regarding Kristine E. Meyers' complaint that her employer, Aurora, refused to

honor her request to substitute paid sick time for unpaid statutory family leave. The Department concluded that even though Meyers was not eligible to take sick leave under the terms of Aurora's sick pay plan, Aurora discriminated against Meyers by "interfering with, restraining, or denying the exercise of a right provided under [the Wisconsin Family and Medical Leave Act]" when it refused to allow her to substitute 96.9 hours of paid sick time for unpaid statutory leave.

¶17 Aurora contends that Meyers' state law claim under the Wisconsin Family and Medical Leave Act (WFMLA) is preempted by the federal Employee Retirement Income Security Act (ERISA). In support of this contention, Aurora argues that the federal Family and Medical Leave Act (FFMLA) "did not nullify the scope of ERISA preemption" and that Congress did not intend to protect the substitution provision of WFMLA from ERISA preemption. We reject Aurora's theory and affirm.

BACKGROUND

¶18 Aurora's employee sick pay benefits are funded through a tax-exempt voluntary employees' beneficiary association, and paid through a sick pay plan that qualifies as an employee welfare benefit plan under ERISA. The terms of the sick pay plan authorize payment of sick time benefits to an employee only when the employee is ill.

¶19 Meyers, a registered nurse, began working for Aurora on July 20, 1995. In January 1997, she requested family leave from January 24 to March 10 for the adoption of a child. She asked that paid sick, holiday/personal, and vacation time be substituted for unpaid statutory leave. Aurora granted Meyers' request for family leave, but notified her that because she was not ill, she would not be allowed to substitute paid sick time for unpaid family leave. Thus, Aurora

allowed Meyers to substitute 12.0 hours of paid holiday/personal time and 40.4 hours of paid vacation time for unpaid family leave. If Aurora had allowed Meyers to substitute paid sick time as she had requested, 96.9 hours of paid sick time, 12.0 hours of paid holiday/personal time, and 11.1 hours of paid vacation time would have been substituted for her unpaid family leave. Meyers then would have had 29.3 hours of unused accrued vacation time upon her return from leave.

¶20 Based on the parties' briefs and stipulation of facts, an administrative law judge (ALJ) concluded that Aurora discriminated against Meyers, in violation of § 103.10, STATS. The ALJ ordered that Aurora make Meyers whole by: (1) paying her $1,039.01, the amount she would have received as additional compensation during her leave if the sick pay substitution had been allowed; (2) crediting her vacation time accrual bank with 29.3 hours, the amount she would not have used if Aurora had permitted the sick pay substitution; (3) reducing her sick leave accrual by 96.9 hours, the amount of time she would have used if the sick pay substitution had been allowed; and (4) reimbursing her for interest on the damages at the rate of 12% annually, simple interest. The ALJ also ordered Aurora to pay Meyers $5,296.25 for attorney's fees and costs.

¶21 Aurora petitioned the circuit court for judicial review, claiming the Department had no jurisdiction over Meyers' claim because it was preempted by ERISA. Meyers requested that Aurora's petition be dismissed and that the Department's decision and order be affirmed. On April 17, 1998, the circuit court affirmed the Department's decision. Aurora appeals.

DISCUSSION

¶22 The preemptive effect of a federal law on WFMLA presents a question of law. *See* ***Miller Brewing Co. v. DILHR, Equal Rights Division***, 210

Wis.2d 26, 33, 563 N.W.2d 460, 463 (1997). Aurora argues that because the supreme court, in ***Miller***, concluded that the Department had no special expertise in determining whether ERISA preempted WFMLA, we should review the Department's decision *de novo*. The Department responds:

> Since judicial review in Miller commenced in 1990, only two years after the enactment of [WFMLA], the preceding agency record, unsurprisingly, displayed "no real evidence of any special agency expertise or experience" on the interplay between federal preemption and [WFMLA]. By 1997, when the decision issued [in the instant case], the Department had several occasions to examine that interplay and, monitoring ongoing developments, had become familiar with the nuances of that interplay.

(citations and record references omitted). Thus, the Department requests that its decision be granted due weight deference. Additionally, the Department contends that its determination should be affirmed regardless of the standard of review we apply. We need not resolve the parties' dispute over the standard of review because, even applying the *de novo* standard, we conclude that the Department's decision was correct.

¶23 As the parties acknowledge, ERISA Subchapter I (addressing protection of employee benefit rights) indicates that its provisions supersede state laws regarding sick pay plans such as the one at issue in this case. *See* 29 U.S.C. § 1144(a) (1998). The same subchapter, however, also states that "[n]othing in this subchapter shall be construed to alter, amend, modify, invalidate, impair, or supersede any law of the United States … or any rule or regulation issued under any such law." *See* 29 U.S.C. § 1144(d) (1998). ERISA, therefore, does not supersede FFMLA.

¶24 FFMLA states: "Nothing in this Act *or any amendment made by this Act* shall be construed to supersede any provision of any State or local law that

provides greater family or medical leave rights than the rights established under this Act or any amendment made by this Act." 29 U.S.C. § 2651(b) (1998) (emphasis added). FFMLA also states that "[t]he rights established for employees *under this Act or any amendment made by this Act* shall not be diminished by any … employment benefit program or plan." 29 U.S.C. § 2652(b) (1998) (emphasis added). Therefore, to the extent to which ERISA is amended by FFMLA, ERISA must yield to any provisions of WFMLA providing greater family leave rights than those provided by FFMLA.

¶25 Under FFMLA, an employee is allowed to substitute accrued paid vacation, personal, or family leave for unpaid family leave for the adoption of a child. *See* 29 U.S.C. § 2612(d)(2)(A) (1998). Under WFMLA, "[a]n employe[e] may substitute, for portions of family leave or medical leave, paid or unpaid leave *of any other type* provided by the employer." Section 103.10(5)(b), STATS. (emphasis added). Because the substitution rights provided under WFMLA are greater than those provided under FFMLA, they are not preempted by FFMLA.

¶26 This conclusion, however, does not resolve the issue of whether ERISA preempts the substitution rights provided by WFMLA. As the supreme court noted in ***Miller***:

> The pre-emption doctrine is rooted in article VI of the United States Constitution, which is commonly referred to as the Supremacy Clause. The question of whether federal law pre-empts state law is one of congressional intent. Federal law pre-empts state law in three situations: (1) where Congress explicitly mandates pre-emption of state law; (2) where Congress implicitly indicates an intent to occupy an entire field of regulation to the exclusion of state law; or, (3) where state law actually conflicts with federal law. The [party seeking the benefit of preemption] bears the burden of establishing pre-emption.

Miller, 210 Wis.2d at 34-35, 563 N.W.2d at 464 (citations omitted). Aurora has failed to meet its "burden of establishing pre-emption." *See* ***id.*** at 35, 563 N.W.2d at 464.

¶27 In interpreting the scope of the preemptive effect of ERISA, we are bound by the presumption that federal statutory law does not supersede the police powers of the State unless that is "'the clear and manifest purpose of Congress.'" *See* ***id.*** (quoted source omitted). Aurora notes that the Department of Labor (DOL) has the authority to issue regulations related to both ERISA and FFMLA and contends that the DOL "made no mention of ERISA pre-emption of state laws under § 2651(b)" in FFMLA regulations because it lacked authorization from Congress "to expand § 2651(b) beyond [FFMLA] itself." Aurora argues that "[t]he only conclusion that reasonably can be drawn from the absence of such language in either the text of [FFMLA] or the implementing regulations drafted by the DOL is that Congress did not intend to eliminate well-established principles of federal pre-emption, except as explicitly provided in the statute." Aurora also contends that it would be inappropriate to examine FFMLA's legislative history because there is no ambiguity in the statute's preemption language. We are not persuaded by Aurora's arguments.

¶28 As the United States Supreme Court declared well over a century ago:

> [I]t is well settled that, in interpreting a statute, the court will not look merely to a particular clause in which general words may be used, but will take in connection with it the whole statute (or statutes on the same subject) and the objects and policy of the law, as indicated by its various provisions, and give to it such a construction as will carry into execution the will of the Legislature, as thus ascertained, according to its true intent and meaning.

> Neither will the court, in expounding a statute, give to it a construction which would in any degree disarm the government of a power which has been confided to it to be used for the general good … unless plain and express words indicated that such was the intention of the Legislature.

Brown v. Duchesne, 60 U.S. 183, 194-95 (1857). Additionally, the Supreme Court has held: (1) "the authoritative source for finding the Legislature's intent lies in the Committee Reports on the bill, which 'represen[t] the considered and collective understanding of those Congressmen involved in drafting and studying proposed legislation'"; and (2) comments from the floor debates are less authoritative than Committee Reports. *See* ***Garcia v. United States***, 469 U.S. 70, 76 (1984) (citations omitted).

¶29 The Department contends that "the sponsors [of FFMLA] intended to insulate State family and medical leave provisions from all federal preemption." The Department is correct. As the Senate Committee on Labor and Human Resources reported:

> Section 401(b) [of Public Law 103-3—now known as 29 U.S.C. § 2651(b)] makes it clear that state and local laws providing greater leave rights than those provided in [FFMLA] are not preempted by the bill or any other federal law….
>
> For example, … Wisconsin State law provisions under which employees may substitute paid or unpaid leave of any other type provided by the employer for portions of family leave or medical leave would not be superseded by [FFMLA].
>
> Section 401(b) also clarifies that state family leave laws at least as generous as that provided in [FFMLA] (including leave laws that provide … paid leave), are not preempted by ERISA ….

S. REP. NO. 103-3, at 38 (1993), *reprinted in* 1993 U.S.C.C.A.N. 3, 40.

¶30 Declarations during United States Senate floor debate in 1993 further support the Department's contention. Prior to the Senate's final vote, Senator Christopher Dodd, the Senate's primary sponsor of FFMLA, responded to requests for confirmation of intent:

> [WISCONSIN SENATOR] FEINGOLD. [] Is it the intent of the sponsors of this bill that the provisions of [ERISA], as amended, shall not prevent the substitution of accrued paid leave, regardless of the source of funding for the paid leave?
>
> [SENATOR] DODD. Yes…. The provisions of [FFMLA] are intended to supersede ERISA and any Federal law. The authors of this legislation intend to prevent ERISA and any other Federal law from undercutting the family and medical leave laws of States that currently allow the provision of substitution of accrued paid leave for unpaid family leave, regardless of the nature of the family leave, so long as those State law provisions are at least as generous as those of this Federal legislation. Certainly, if Wisconsin law allows either an employer or an employee to substitute accrued paid leave to care for a newly born or adopted child on terms at least as generous as in this legislation, it is our intent that no Federal law prevent Wisconsin law from making this allowance.
>
> ….
>
> [WISCONSIN SENATOR] FEINGOLD. Is it the intent of the bill sponsors that the provisions of neither ERISA nor any other Federal law would preempt any provisions of any State family or medical leave law to the extent those provisions are at least as generous as the provisions in this Federal legislation?
>
> [SENATOR] DODD. Yes; it is certainly our intent that, as Federal legislation enacted subsequent to ERISA, [FFMLA] supersedes ERISA to the extent ERISA preempts any State leave law provisions which are at least as generous as the provision of [FFMLA]. The same principle applies to any other previously enacted Federal law. Enactment of [FFMLA] allows States to provide leave on terms as generous or beneficial, or even more generous or beneficial, to workers. Both ERISA and all other Federal laws which would interfere with this intent in any way are clearly superseded to that extent. [FFMLA] makes clear that any provisions of any State leave laws that are at least

> as generous or beneficial to workers as those in [FFMLA] will not be preempted by ERISA or any other Federal law.
>
> [WISCONSIN SENATOR] KOHL. If only some of the provisions of a State law are at least as generous or beneficial to workers as [FFMLA], is it the intent of the sponsors that those provisions are not preempted by this or any other Federal law?
>
> [SENATOR] DODD. Yes.

139 CONG. REC. S1254, 1347-48 (daily ed. Feb. 4, 1993).

¶31 Statements during the House of Representatives floor debate in 1991 also bolster the Department's contention. As noted by Representative William Goodling:

> [T]he intent of this bill is to modify the preemption provisions of ERISA, noting that [FFMLA] should be interpreted to protect benefit-related provisions of state family leave laws from preemption by ERISA. This discussion is expressly targeted at reversing a … Wisconsin case which found that provisions of Wisconsin's leave law relating to substitution of leave [were] preempted by ERISA.

137 CONG. REC. H9722-02, 9725 (daily ed. Nov. 13, 1991). Additionally, Representative Bart Gordon observed:

> It is the intent of the sponsors of this bill that the provisions of [ERISA], as amended, would not preempt any provisions of State family and medical leave legislation. As Federal legislation enacted subsequent to ERISA, [FFMLA] supersedes ERISA to the extent that ERISA might be held to preempt State leave law provisions. Enactment of [FFMLA] will still allow States to provide even more generous leave protections for workers. [FFMLA] makes clear that State family and medical leave laws that are at least as generous as the Federal legislation are not preempted by ERISA or any other Federal law.

137 CONG. REC. H9761-01, 9776 (daily ed. Nov. 13, 1991). Thus, both the Senate and House history confirm the Department's understanding of the law.

¶32 Therefore, we conclude that Meyers' state law claim under WFMLA is not preempted by ERISA. Accordingly, we also conclude that Meyers is entitled to substitute paid sick time for unpaid statutory family leave although the terms of the sick pay plan authorize payment of sick time benefits to an employee only when the employee is ill. *See* ***Richland Sch. Dist. v. DILHR, Equal Rights Div.***, 174 Wis.2d 878, 894, 498 N.W.2d 826, 832 (1993) (holding that § 103.10(5)(b), STATS., "requires a covered employer to allow an employe[e] entitled to leave under [WFMLA] to substitute accrued employer-provided leave without regard to whether all conditions of leave eligibility for the employer-provided leave [have] been met.").

By the Court.—Order affirmed.

Recommended for publication in the official reports.