COURT OF APPEALS
DECISION
DATED AND RELEASED

March 28, 1996

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.

NOTICE

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

No. 94-1943

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

KATHLEEN BARRY-CHAMBERLAIN,

Petitioner-Respondent,

v.

DEPARTMENT OF INDUSTRY, LABOR AND HUMAN RELATIONS,

Respondent,

MADISON METROPOLITAN SCHOOL DISTRICT,

Respondent-Appellant.

APPEAL from an order of the circuit court for Dane County: MICHAEL N. NOWAKOWSKI, Judge. *Affirmed.*

Before Eich, C.J., Gartzke, P.J., and Sundby, J.

SUNDBY, J. Madison Metropolitan School District appeals from an order of the Dane County Circuit Court entered June 28, 1994. We identify the following as the dispositive issue:

> Did the Madison Metropolitan School District violate the Wisconsin Family and Medical Leave Act (FMLA) when it refused to pay the petitioner employee's health insurance premiums for the month when she did not return to work after family leave? We conclude that it did.

Section 103.10(9)(b), STATS., of FMLA provides in part:

> If the employe [who takes family or medical leave] continues making any contribution required for participation in the group health insurance plan, the employer shall continue making group health insurance premium contributions as if the employe had not taken the family leave or medical leave.

Petitioner took family leave from March 23 through April 2, 1993, and April 13 through May 11, 1993. After expiration of her family leave, petitioner remained on an unpaid leave for the remainder of the 1992-93 school year, which included seventeen work days from May 12 through June 4, 1993. The District refused to provide petitioner with paid health insurance coverage after May 31, 1993. Petitioner argues that § XV(F) of the District's employee's manual requires the District to pay her health insurance premium for the month of June. Section XV(F) provides: "During a leave of absence, the employee will pay the full monthly premium for coverage beginning with the first of the month following one month of leave and through the end of the month in which the leave ends." The District argues that petitioner's leave ended in May and her obligation to pay for health insurance coverage, therefore, began June 1.

The parties strenuously dispute our standard of review of the department's decision. We believe that ***Richland School Dist. v. DILHR***, 174 Wis.2d 878, 890-94, 498 N.W.2d 826, 830-32 (1993), and the cases relied on by the court therein establish that we apply the "great weight" standard to the

department's interpretation of FMLA. However, whether we accord the department's interpretation of the statute deference or decide the issue *de novo*, our conclusion is the same. *See* ***id.*** at 895, 498 N.W.2d at 832. We agree with the trial court that the department interpreted § 103.10(9)(a) and (b), STATS., contrary to the legislative intent. In that circumstance, we do not accept the department's interpretation. *See* ***Lisney v. LIRC***, 171 Wis.2d 499, 506, 493 N.W.2d 14, 16 (1992).

The District argues that petitioner's obligation to pay for health insurance coverage began the first of the month after her family leave ended. Petitioner counters that her obligation to pay the monthly premium for coverage did not begin until the first of the month following her unpaid employer-provided leave. Because that leave ended June 4, 1993, she argues that her obligation to pay the premium for her coverage did not begin until July 1, 1993. We agree. The District's construction would provide petitioner with less benefits because she had taken family leave than would have been the case had she taken an unpaid leave of absence without prior family leave.

The District's construction violates the construction which the Wisconsin Supreme Court has given to FMLA that an employee taking family leave shall not be discriminated against because of that leave. *See* ***Richland School Dist.***, 174 Wis.2d at 901, 498 N.W.2d at 834 ("In FMLA, the legislature has carefully balanced the public policy interests in providing employes with family and personal leave and in helping employers maintain a stable work force."). The District was required to treat the petitioner during her employer-paid leave of absence just as it would have treated any other employee taking such a leave of absence.

The petitioner also claims that the District violated FMLA when it refused to allow her to substitute two paid personal leave days and two-and-one-half days of accumulated compensatory time for family leave days. The administrative law judge concluded that the District granted her substitution request "in a manner which was no more restrictive than she was entitled to under the FMLA." Section 103.10(5)(b), STATS., provides: "An employe may substitute, for portions of family leave or medical leave, paid or unpaid leave of any other type provided by the employer." Petitioner requested that her paid personal days and compensatory days be substituted for family leave days. Instead, the District paid her for these days in her last paycheck. Petitioner argues that had the District paid her substitution days at the end of her family

leave, she would have been in pay status as of May 11, 1993, her last day of family leave. If she were in pay status as of the end of her last day of family leave, her subsequent leave of absence would have clearly fallen within § XV(F) of the District's policy. The trial court concluded that the specific dates petitioner requested to substitute and the dates the District granted her family leave were not relevant to the question whether the District was required to provide petitioner with paid health insurance coverage through June 1993 because § 103.10(9) so required. We agree. Therefore, we do not decide whether petitioner could select the family leave days she wished to have substituted with her four-and-one-half paid substitution days.

By the Court.—Order affirmed.

Not recommended for publication in the official reports.