

## CERTIFICATION

I, Karen Pierce, Legal Assistant for the Equal Rights Division (ERD), hereby certify that the attached copy of the decision in the matter of **Marie Moran v. County of Waukesha, ERD Case #CR201803226**, issued on February 16, 2021, is an exact copy of the original decision on file with the Equal Rights Division.



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Karen Pierce  
Legal Assistant  
Equal Rights Division

Marie Moran  
W277 N5043 Lynndale Lane  
Pewaukee WI 53072  
Complainant

vs.

County of Waukesha  
515 West Moreland Boulevard, Suite 1160  
Waukesha WI 53188  
Respondent

**NOTICE OF APPEAL RIGHTS  
REVIEW BY COURT**

Re: ERD Case No. CR201803226

Dated & Mailed: February 16, 2021

A final decision and order in this case is enclosed. Any party whose interests are adversely affected by this administrative decision may seek judicial review of the decision. Such review is authorized by Section 227.52, Wis. Stats.

A petition for review must be filed within thirty (30) days after this decision is mailed to the parties. It shall designate as the Petitioner the party filing the petition, and as the Respondent the Department of Workforce Development, Equal Rights Division. The petition for review shall state the nature of the petitioner's interest, the facts showing that the petitioner is a person aggrieved by the decision, and the grounds upon which a review is sought.

The petition for review must be filed in the office of the clerk of circuit court for the county where the petitioner resides. If the petitioner is a non-resident of the State of Wisconsin, the proceedings shall be in the county where the property affected by the decision is located, or if no property is affected, in the county where the dispute arose. A copy of the petition must be served by certified mail upon the Department of Workforce Development, Equal Rights Division. The address of the Department of Workforce Development, Equal Rights Division is 819 North 6th Street, Room 723, Milwaukee, Wisconsin 53203 or 201 East Washington Avenue, Room A100, P. O. Box 8928, Madison, Wisconsin 53708. Copies of the petition for review must also be served upon all parties who appeared before the Department in the case being appealed no later than thirty (30) days after commencing the proceedings for review. The copies shall be served personally or by certified mail (or, when service is timely admitted in writing, by first-class mail). The Complainant(s) and Respondent(s) whose names and addresses appear in the caption of this decision are considered parties for purposes of judicial review.

Any person aggrieved by this decision and order may petition the Equal Rights Division for rehearing within twenty (20) days after the decision is mailed to the parties. The petition for rehearing must specify in detail the grounds for the relief sought, as well as supporting authorities, in accordance with Section 227.49, Wis. Stats. Copies of the petition for rehearing shall be served on all parties of record. Please note that the filing of a petition for rehearing does not delay the effective date of this order.

Enclosure

cc: Complainant  
Respondent, Attn: HR Director  
Christopher M. Kloth, Attorney for Complainant  
Mary E. Nelson, Attorney for Respondent

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

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Marie Moran  
W277N5043 Lynndale Lane  
Pewaukee, Wisconsin 53072

Complainant

v.

**FINAL DECISION AND  
MEMORANDUM OPINION**  
ERD Case No. CR201803226

County of Waukesha  
515 W Moreland Boulevard, #1160  
Waukesha, Wisconsin 53188

Respondent

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In a complaint filed with the State of Wisconsin, Department of Workforce Development - Equal Rights Division (the Division) on December 5, 2018, the Complainant alleged that the Respondent violated the Wisconsin Family and Medical Leave Law, Wis. Stats. §103.10 (the WFMLA or the Act) by interfering with, restraining or denying her exercise of a right provided under that law. In an Initial Determination issued on January 9, 2019, an Equal Rights Officer for the Division determined that there was Probable Cause to believe that the Respondent had violated the Act as alleged, and the case was certified for a hearing on the merits of the complaint.

On March 7, 2018, the Respondent filed its Answer to the complaint with affirmative defenses.

Hearing was held before Administrative Law Judge Laura Amundson on January 14-15, 2020 in the Lee Sherman Dreyfus State Office Building at 141 N.W. Barstow Street in Waukesha, Wisconsin. The Complainant appeared and was represented by her attorney, Christopher Kloth. The Respondent appeared and was represented by its attorney, Mary Nelson, with the Respondent's Clerk of Court, Gina Colletti.

A transcript of the proceeding was prepared by court reporter Jennifer Steidtmann of Halma Reporting Group, Inc., and filed with the Division on January 28, 2020. The parties submitted post-hearing briefs, the last of which was filed with the Division on April 10, 2020.

Based on the evidence received at hearing, the Administrative Law Judge issues the following:

FINDINGS OF FACT

1. The Respondent, the County of Waukesha, is a subdivision of the State of Wisconsin with offices located at 515 West Moreland Boulevard in Waukesha, Wisconsin.

2. The Respondent employed more than 50 individuals during the time period relevant to the complaint.
3. The Complainant, Marie Moran, began employment as a Senior Administrative Specialist (legal clerk) with the Respondent on October 12, 2015, and worked full time in that capacity until her employment was terminated on January 11, 2019.
4. During the time period relevant to the complaint, the Complainant had worked for the Respondent for more than 52 continuous weeks, and had worked for more than 1000 hours in the 52 weeks preceding her need to take leave under the Act.
5. As of December 5, 2018, the Complainant had not exhausted her annual allocation of Wisconsin family and medical leave for the 2018 calendar year.
6. During the time period relevant to the complaint, the Respondent did not have a written policy setting forth the manner in which an employee was to request family and medical leave.
7. As the Respondent's Chief Deputy Clerk, Monica Paz, explained in her hearing testimony, employees who requested leave would enter their leave requests in IntelliTime software on the Respondent's Circuit Court Services Intranet, and would designate their request as one for paid or unpaid leave at that time. However, the Complainant would frequently consult with a supervisor prior to entering any leave request into IntelliTime, and then would enter her request consistent with the type of leave for which she had obtained verbal approval from a supervisor.
8. During the time period relevant to the complaint, four of the Complainant's five children, D.M. (age 18 on the date of hearing), Ev.B. (12), El.B. (11), and L.C. (9), each suffered from a serious health condition within the meaning of the Act.
9. Beginning as early as March 2016, the Complainant was finding it necessary to pick L.C. up from school because of his behavior issues which were "getting a little more out of control", but she did not request family and medical leave at that time.
10. Beginning in 2017, the Complainant needed to take "block" and/or intermittent family and medical leave under the Act to care for her children's serious health conditions. She needed to take leave to care for El.B.'s serious health condition in 2017, to care for L.C.'s serious health condition in both 2017 and 2018, and to care for D.M. and Ev.B.'s serious health conditions in 2018.
11. L.C. was hospitalized for approximately one week in June 2017, and needed intensive in-home therapy following his release. On June 28, 2017, the Respondent approved the Complainant's June 22, 2017, request to take intermittent leave to care for L.C.'s serious health condition. On August 16, 2017, the Complainant again was approved to take intermittent leave to care for L.C.'s serious health condition, for the period of August 2, 2017, through December 31, 2017. The Complainant did not check either "Yes" or "No" on her June 2017 family and medical leave request to indicate whether she wished to substitute paid leave for any portion of her unpaid WFMLA leave, and checked "No" on the form for her August 2017 request.

12. Whenever possible, the Complainant scheduled L.C.'s appointments outside of her work hours to avoid having to take leave for them.
13. On December 7, 2017, the Respondent approved the Complainant's request to take family and medical leave for partial days to care for El.B.'s serious health condition from November 27, 2017, through January 25, 2018. The Complainant indicated in her request that she did not wish to substitute paid leave for any portion of her WFMLA leave. The Complainant scheduled any appointments for El.B. outside of her work hours whenever possible to minimize her need to take leave from work for El.B.'s care.
14. Paz was the Complainant's direct supervisor in 2018.
15. On February 26, 2018, the Respondent approved the Complainant's request to take intermittent family and medical leave from February 12, 2018, through August 12, 2018, to care for D.M.'s serious health condition after her release from a one-week hospitalization relating to severe trauma and depression. The Complainant indicated on her leave request form that she did not wish to substitute paid leave for any portion of her unpaid WFMLA leave. The Complainant scheduled any appointments relating to D.M.'s care outside of her work hours whenever possible to minimize her need to take leave for D.M.'s care.
16. In May 2018, the Complainant requested family and medical leave to care for Ev.B.'s serious health condition following her hospitalization for major depressive disorder. The Complainant indicated in her request that she did not wish to substitute paid leave for any portion of her unpaid WFMLA leave. On May 16, 2018, Human Resources Analyst Natalie Durr sent the Complainant an email asking her to provide "an estimated time frame for how long ... weekly family sessions are to occur" in order for her to process the leave request. On the same date, the Complainant responded by email with the requested information, also asking for "guidance of what [she could] do now".

The Complainant described in her email the logistics of getting Ev.B. to needed appointments, and mentioned her unsuccessful effort to get Ev.B. "set up for transportation" that would not require the Complainant to personally drive Ev.B. to her appointments. The Complainant further explained that she was trying to find out whether Ev.B.'s therapist offered evening appointments, and stated that if they did, she would schedule appointments in the evening to avoid interference with her work day.

The Complainant went on to describe her efforts to work toward having Ev.B. enroll in a "Day Treatment" program that would require the Complainant to use leave time to take Ev.B. to appointments less frequently than once per week, and to arrange to have "phone family sessions" instead of in-person appointments more often to cut down on the need for her to take leave to take Ev.B. to appointments.

The Complainant concluded her message to Durr by stating that she hoped that, "this helps and you can shed some light on what steps I can take now". On May 17, 2018, the Respondent approved the Complainant's request to take intermittent family and medical leave for an indeterminate period to care for Ev.B.'s serious health condition. On May 21, 2018, the Complainant was further approved to take intermittent leave to care for Ev.B.'s serious health condition through December 31, 2018.

The Complainant scheduled any appointments for Ev.B.'s care outside of her work hours whenever possible to minimize her need to take leave for her care.

17. In October 2018, the Complainant needed to use family and medical leave to take Ev.B. to a treatment appointment once per week, having been unable despite her efforts to arrange for the appointments to be scheduled at times that would not require her to leave work. The best appointment times the Complainant was able to get for Ev.B.'s appointments in October 2018, to interfere with her work schedule as little as possible, were on Tuesdays at 4:00 or 4:30 p.m. The Complainant arranged to have Ev.B.'s appointments on Tuesdays, as late in the day as possible, because Tuesdays tended to be the least busy day of the week for the Respondent's law clerks. The Complainant also established "a standing understanding" with Ev.B.'s health care provider "that if a later appointment cancelled to please contact [the Complainant] so [she] could try to get into that later time slot".
18. Among the times the Complainant took leave in October 2018 to care for Ev.B.'s serious health condition, she learned of October 16<sup>th</sup> and November 13<sup>th</sup> appointments on September 13<sup>th</sup> or 14<sup>th</sup>, and requested leave for those appointments on September 14<sup>th</sup>; learned of an October 31<sup>st</sup> appointment on September 20<sup>th</sup> or 21<sup>st</sup>, and requested leave for the appointment on September 21<sup>st</sup>; and learned of an October 9<sup>th</sup> appointment on October 2<sup>nd</sup>, requesting leave for the appointment on October 2, 2018.
19. L.C. had ongoing therapy appointments the Complainant transported him to in October 2018, but the Complainant did not request leave for those appointments because she was able to schedule L.C. for evening appointments in October 2018. The Complainant also needed to take her other children besides Ev.B. and L.C. to appointments in October 2018, but she did not request to take family and medical leave for those appointments because she was able to schedule them outside of her work hours.
20. The Complainant's timeliness in arriving to work promptly by 8:00 a.m. was imperfect during the period from July 2016 through October 2018. She received warnings concerning failure to arrive to work on time on July 15, 2016, and June 26, 2017, received a warning for "unacceptable behavior" relating to having taken an extended break to deal with a family legal matter on October 21, 2016, and was "counseled from October 22, 2018, through October 28, 2018 for failure to arrive to work on time". The Complainant's October 21, 2016, disciplinary warning pertained to the Complainant's having had to file for a Temporary Restraining Order in September 2016, and having talked with her attorney about the matter in a hallway or conference room at work at the attorney's request on October 5, 2016. At that time, the Complainant had expected the discussion to take five to ten minutes during her break, but the conversation ended up taking longer, beyond an acceptable amount of time for her to take a break without first talking with her supervisor for authorization.
21. On November 5, 2018, the Respondent issued the Complainant a one-day disciplinary suspension for a clerking mistake whereby the Complainant canceled an inmate's court appearance as requested by a party, but failed to cancel the inmate's transport from a correctional institution to court, resulting in the Respondent's unnecessarily being billed the \$1,152.00 transport cost.
22. On November 9, 2018, the Respondent placed the Complainant on a Performance Improvement Plan (PIP). That plan required the Complainant to adhere strictly to the requirement to report on time for her daily work shift beginning at 8:00 a.m., to limit personal

phone calls to scheduled breaks or lunch time, to schedule non-work appointments outside of normal working hours whenever possible, and to "obtain documentation from the provider stating the same" when she was unable to schedule the appointments outside of work hours. This last directive appeared, and was interpreted by the Complainant, to mean that she was required to provide such documentation each time she was unable to schedule one of her children's appointments outside of her normal working hours. Finally, as one of the terms of the PIP, the Respondent required the Complainant to request leave at least 48 hours in advance of her need to take the leave. The PIP specified that it would be in effect for 30 days, that a manager would be meeting with the Complainant bi-weekly regarding her progress, and that failure to meet the requirements of the PIP could result in termination of her employment.

23. The Complainant had been able to have L.C. scheduled for evening appointments in October 2018 in part because he was only being seen by a therapist once every two to four weeks at that time. However, L.C.'s need for care increased in November 2018. On November 12, 2018, the Complainant needed to take a call relating to L.C.'s serious health condition at the time of her 10:00 a.m. break, and the call unexpectedly lasted until 10:45. The Complainant testified that she had requested to take leave to attend the appointment in person, but the Respondent had denied that request because the Complainant had not provided documentation indicating that the appointment could not be scheduled outside of her work hours, as required under her PIP. The Complainant was able to persuade Rogers Memorial Hospital to allow her to participate in the appointment by telephone, but the discussion ended up lasting longer than her 15-minute break time. Following the call, the Complainant spoke with her supervisor and arranged not to take a lunch break that day since she had taken the unexpectedly long break for her phone call regarding L.C.'s care that morning.
24. On the morning of Tuesday, November 13, 2018, the Complainant attended a meeting with Paz and another supervisor, Nicci Grzesk, concerning her PIP. The Supervisor's Comments section of the Record of Conversation/Notice form memorializing their meeting indicates that the Complainant looked "pale and run down", and that the Complainant's supervisors emphasized at the meeting that the Complainant needed to take care of herself. The supervisors' notes in the Employee Comments section of the form also indicate that the Complainant asked at the meeting if she could leave work early on that day because she felt sick. Paz told the Complainant that it would be "up to her", but that she would need to have a doctor's excuse when she returned to work. The notes further state that the Complainant informed her supervisors during their meeting that L.C. was going to be released from the hospital that Saturday (November 17, 2018), and that an aftercare plan for him was in the works. The matter of the long phone call concerning L.C.'s care the day before was discussed with the Complainant and memorialized in the notes for that day's meeting as an "issue" with respect to her performance under the PIP.
25. Later on November 13, 2018, at 10:16 a.m., the Complainant texted Paz to notify her that she was going to urgent care. The Complainant specified in her text that, "All my stuff is caught up with, my check cases done, and anything in the queue for me has been taken care of". At 11:57 a.m., the Complainant messaged Paz with an update, stating that she was waiting for a CT scan. At 12:02 p.m., Paz messaged her back, stating, "You will need to prove a doctors note indicating that you were seen in person today. Additionally it needs to indicate how the situation has caused an inability to perform your job functions".

26. At 12:41 p.m. on November 13, 2018, Paz sent the Complainant an email summarizing the events of that morning and their text message exchange regarding the Complainant's visit to urgent care. The Complainant responded at 8:15 a.m. on November 14, 2018. In her message, the Complainant explained that she had a doctor's note for her visit, but stated that she was concerned that Paz seemed to be placing extra requirements on her regarding documentation for the appointment, and that she would be discussing her concerns with the Respondent's human resources staff. The Complainant shared, "Turns out I have something more serious wrong with me aside from just being sick", and mentioned that she felt that she was unable to seek the medical care she needed "because of the unreasonableness of the standards" Paz was requiring her to meet "compared to anyone else".

The Complainant went on to point out in her email that she had "never had an issue with excessive absence" for calling in sick in relation to her own illness, but only had:

had an issue with things going on with [her] children, which, in hind sight, [she] should have used all FMLA for rather than [her] own personal time because all the reasons [she] miss[ed] work is for their medical reasons which has always been covered under FMLA. Then [she] was told at one point that [she] need[ed] to use [her] personal time to cover times [she had] missed for [her] FMLA and it would all be converted later and none of it ever was.

The Complainant explained at hearing that the above comments referred to the fact that she had previously wanted to take family and medical leave she had taken as unpaid leave, but she "was being forced to use [her] own personal vacation or sick time to cover any time that [she] was missing" for family and medical leave-qualifying reasons, and that she had been "told that [she] had to be paid for it for the first 80 hours". The Complainant testified that she had been told that since she first began taking family and medical leave in 2017.

27. The Respondent's Senior Human Resources Analyst, Teri Henning, met with the Complainant to follow up on the concerns she had expressed in her email to Paz on the afternoon of November 14, 2018. At that time, Henning provided the Complainant with copies of the Respondent's leave policies regarding paid sick leave, scheduling vacation/voluntary leave, and compensatory time. Henning also provided the Complainant with a document relating to the federal Family and Medical Leave Act, but provided her with no information about the WFMLA. During their meeting, Henning explained why Paz was denying the Complainant's time off requests and requiring documentation from her children's medical providers relating to the availability of appointments outside of the Complainant's work day.

28. Paz responded to the Complainant's 8:15 a.m. email at 4:42 pm. on November 14, 2018, stating that she had spoken with Henning, who had confirmed that she had asked the Complainant to provide medical certification for her previous day's doctor visit, and that the Complainant was required to provide that documentation by November 16, 2018. Paz also acknowledged that Henning told her the Complainant would be "reaching out to [her] medical care provider" concerning a future appointment she needed to schedule.



29. L.C.'s second inpatient admission to Rogers Memorial Hospital lasted from November 4 through November 17, 2018. At the time of his hospitalization in November 2018, L.C. was exhibiting aggressive behavior, lashing out at school, attacking animals, family members, teachers, and other children, and making death threats.
30. The Complainant submitted a request dated November 18, 2018, and received by the Respondent on November 20, 2018, to take intermittent family and medical leave to care for L.C.'s ongoing serious health condition beginning on November 4, 2018, through December 31, 2018. The Respondent approved that request on November 30, 2018. The Complainant "originally" checked the "No" box on her leave request form as to whether she wished to substitute paid leave for unpaid family and medical leave, but Henning also checked the "Yes" box on the form following a telephone conversation with the Complainant on November 28, 2018, concerning the leave request. The Complainant testified at hearing that she had wished to take unpaid family and medical leave to care for L.C.'s serious health condition in November and December 2018, and was unaware that Henning was altering her family and medical leave form by checking the box to allow substitution of paid leave for unpaid WFMLA leave at the time of their telephone conversation. Henning testified that the Complainant was provided with a copy of the completed family and medical leave request form after she had checked the box allowing substitution of paid leave for unpaid WFMLA leave, and that the Complainant never contacted her regarding that change to the form.
31. When L.C. was released from the hospital on November 17, 2018, he was scheduled for intensive therapy as needed aftercare.<sup>1</sup> On that afternoon, the Complainant learned that L.C.'s first two aftercare therapy appointments were scheduled for the afternoon of Tuesday, November 20 and for November 26, 2018.
32. L.C.'s therapist's office was not open on weekends, and the Complainant was only able to contact them to try to reschedule L.C.'s November 20<sup>th</sup> and November 26<sup>th</sup> appointments after their office opened on November 19, 2018. The Complainant called L.C.'s therapists' office to try to reschedule his upcoming appointments on the morning of November 19<sup>th</sup>, but no other appointments were available for the next two weeks. Although the Complainant was not able to reschedule L.C.'s appointments for the weeks of November 18 and November 25, 2018, she did have L.C.'s therapist's office put her "on a list where, if something opened up in the evening, they would call" her.
33. The Complainant immediately informed Paz on Monday morning, November 19, 2018, that L.C. had been released from the hospital on November 17, 2018, as expected, and notified Paz of the dates and approximate times of L.C.'s appointments scheduled for November 20 and 26, 2018. The Complainant also informed Paz that she was calling L.C.'s therapist's office to try to get those appointments rescheduled to times outside of her normal working hours. During their conversation, the Complainant told Paz that she thought she had left her family and medical leave paperwork pertaining to L.C.'s care in her truck, that she would check for it, and that she would bring it in to work the next day if she did not find it in her truck. Paz responded that the Complainant should let her know the outcome of her effort to reschedule

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<sup>1</sup> L.C.'s medical care provider(s) thought he should have more intensive therapy than he ended up receiving in November 2018, but the Complainant had him scheduled only for once-weekly appointments, because she could find no way for L.C. to be transported to appointments more frequently.

L.C.'s upcoming appointments and should bring her the family and medical leave paperwork if she found it in her truck.

34. At 2:53 p.m. on November 19, 2018, the Complainant emailed Paz to let her know that she had checked her truck for her family and medical leave paperwork, but it was not there, and she would bring it in the next day. The Complainant further shared that she had called L.C.'s therapist's office to try get his upcoming appointments rescheduled, but there were no alternative time slots available. The Complainant informed Paz that she would need to leave work at 1:15 p.m. the next day to take L.C. to his 2:00 p.m. therapy appointment, and that she would need to leave work around 3:30 p.m. on November 26, 2018, to take L.C. to a 4:15 p.m. therapy appointment. The Complainant concluded her email by stating that she was going to be "working with the therapist to schedule more convenient times for these moving forward".
35. The Complainant testified that she "originally" intended to take her requested family and medical leave for November 20, 2018, as unpaid leave, and that she also intended to take her requested family and medical leave for November 26, 2018, as unpaid leave.
36. Paz did not respond to the Complainant's leave requests for L.C.'s upcoming appointments on November 19, 2018.
37. On the morning of November 20, 2018, the Complainant met with Paz and the Respondent's Civil Division Supervisor, Francesca Backus, for one of the bi-weekly meetings mandated by her PIP. Before the meeting started, the Complainant gave Paz the family and medical leave paperwork she had spoken to Paz about the day before. At the end of their meeting, Paz informed the Complainant that her request to take family and medical leave to take L.C. to his appointment that afternoon had been denied. The Complainant asked why her request was denied. Paz replied that it was the county's policy to require two business days' notice for any family and medical leave, and that the Complainant had not provided enough notice of her need to take leave. Paz further stated that an additional reason for denying the Complainant's leave request was because her family and medical leave certification form had not been turned in.
38. In their Record of Conversation/Notice documentation concerning the Complainant's November 20, 2018, PIP meeting, the Complainant's supervisors wrote that their reason for denying her family and medical leave request was that, "No request was submitted for both appointments other than the email notification", and that, "Due to the untimely notification and lack of time off request the request for 11/20 is being denied". Under "Additional Supervisor Comments", they wrote that the Complainant told them that she had just found out about L.C.'s upcoming appointments on (Saturday) November 17, 2018. They also wrote, "Given the lack of communication and untimeliness we reaffirmed that today's request was denied. We stressed office coverage and she is not in a position to choose when she leaves".
39. The Complainant's understanding had been that the requirement for an employee to provide two days' notice if they needed to take leave applied "if you needed a doctor's appointment or just some time off", but that the two-business day notice requirement did not pertain to family and medical leave requests. The Complainant was "extremely frustrated and upset, along with very confused" about the denial of her family and medical leave request for November 20, 2018, because she had informed Paz of her need to take leave immediately on Monday morning, after only having been notified of L.C.'s upcoming appointment over the weekend. The Complainant went back to her desk following her PIP meeting and considered canceling

L.C.'s appointment since her leave request had been denied. However, in the end, she decided she needed to keep the appointment, as her "son's life was on the line".

40. In the face of the denial of her request to take leave for L.C.'s appointment to treat his serious health condition, the Complainant nevertheless left work shortly after 1:15 p.m. on November 20, 2018, to take him to the appointment, emailing Paz at 1:16 p.m. before leaving. In her email, the Complainant told Paz that the appointment she was leaving work for "would be covered by [her] FMLA paperwork [she] provided [that] morning", and that accordingly, she was leaving to take L.C. to the appointment. The Complainant emphasized in her email that she had not been able to contact L.C.'s therapist's office until Monday because it was closed on weekends, and reiterated, as she had explained in her previous email requesting leave and in her discussion with Paz the day before, that she had tried to reschedule L.C.'s appointments for the weeks of November 18<sup>th</sup> and November 25<sup>th</sup> to times that would not interfere with her work schedule, but that no other appointment times had been available for either of those weeks. The Complainant further explained that at her request, L.C.'s therapist's office had put the Complainant "on a list where, if something opened up in the evening, they would call" her.
41. The Complainant explained at hearing that in addition to sending her email to Paz at 1:16 p.m., she informed coworkers on November 20, 2018, that she was leaving to take L.C. to his appointment before she left. Specifically, she told "the legal clerks that stay upstairs and work at the windows with [her]", and "told those immediately close to [her] who would pretty much ultimately end up having to handle any customers that walked in or attorneys".
42. At 4:25 p.m. on November 20, 2018, Paz replied to the Complainant's email of 1:16 p.m., stating that the decision to deny her leave had been made prior to the Complainant's submission of her FMLA paperwork<sup>2</sup>, and indicating that the Complainant's request had been denied because she "did not provide notice as soon as practicable under the facts and circumstances" of the situation. In her reply to the Complainant's email (in which the Complainant had notified Paz that she was leaving for L.C.'s appointment), Paz stated that the Complainant had failed to communicate "to [Paz] as [her] direct supervisor, [her] Branch (Hope), or anyone else<sup>3</sup> that [she] was leaving" to take L.C. to his appointment.
43. Paz testified at hearing that she would have denied the Complainant's family and medical leave request for the afternoon of November 20, 2018, regardless of when she made it, because the Complainant was needed for office coverage on that date. Paz explained that while all four of the Respondent's legal clerks other than the Complainant were scheduled to be in the office on the afternoon of November 20, 2018, they were all less senior in the legal clerk position than was the Complainant. In addition, some other County staff were out of the office on that day, and Paz was scheduled to attend training that she might have had to leave if any questions or unusual situations came up.

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<sup>2</sup> Paz did not explain why she ignored the family and medical leave paperwork the Complainant turned in on the morning of November 20, 2018, when denying the Complainant's family and medical leave request on that date.

<sup>3</sup> The Respondent offered no testimony or other evidence explaining how Paz arrived at the conclusion that the Complainant had not notified her fellow legal clerks that she was leaving to take L.C. to his appointment on the afternoon of November 20, 2018, nor did either party call Hope or any of the Complainant's above-mentioned coworkers to testify at hearing.

44. Backus and Grzesk met with the Complainant on November 27, 2018, concerning her progress under the PIP. In their Record of Conversation/Notice notes of the meeting, they checked a box stating "Yes" indicating that there were "issues" concerning the PIP's requirement that the Complainant, "Schedule appointments outside of work hours, in so far as possible", and, "When not possible, obtain documentation from the provider stating the same". In their comments concerning that requirement, they wrote:

Your 11/20/18 1:15 pm appointment was denied because you did not provide notice as soon as practicable under the facts and circumstances. Despite being told you were needed in the office for coverage, you clocked out of Intellitime at 1:15 p.m. You did not communicate to Monica as your direct Supervisor, your Branch (Hope), or anyone else that you were leaving. This situation is currently under review by Human Resources. Additionally, your request to leave on 11/26/18 at 3:30 pm was not entered into the Circuit Courts Intranet System until 8:42 am on 11/26/18, when reminded by Monica. Pursuant to the Circuit Court Service policy that was distributed as recently as May 17, 2018, "employees should post a time off request to the Circuit Courts Intranet System". A copy of which is being provided to you today.

Backus' notes in the Employee Comments section of the Record of Conversation/Notice further indicate that Grzesk asked the Complainant during their meeting whether she had notified Paz or her team that she was leaving to take L.C. to his appointment on the afternoon of November 20, 2018, and that, "Marie stated that her team, other legal clerks, were aware but she did not tell Hope".

45. On November 30, 2018, Backus and Grzesk again met with the Complainant to discuss her progress under the PIP. At that meeting, they emphasized that the Complainant was required to provide documentation substantiating that no appointments outside of her normal work hours were available for each of her children's recent and upcoming medical appointments for which she needed to take leave during the work day. Under "Additional Supervisor Comments" on the form, Backus and Grzesk's notes state that they, "...reminded Marie that the plan states that she must provide documentation prior to the appointment but if she can not, it must be as soon as possible", and that, "all appointments must have documentation if scheduled during work hours".
46. On December 4, 2018, Backus and Grzesk again met with the Complainant to discuss her progress under the PIP. At that meeting, they reiterated that the Complainant was required to provide documentation when she was unable to schedule her children's medical appointments outside of her normal working hours. Henning also attended part of that meeting and provided the Complainant with a packet of information relating to the federal Family and Medical Leave Act and a copy of Wisconsin Administrative Code sections pertaining to the WFMLA.
47. In an email sent to the Complainant at 10:19 a.m. on December 5, 2018, Henning instructed her to, "consult with [her] supervisor prior to scheduling treatment for this year (and next) In order to work out a schedule that best suits the needs of the courts. When not possible, provide documentation from the health providers stating such".
48. At 10:15 a.m. on December 5, 2018, Paz sent the Complainant an email stating that she was approving the Complainant's request to take time off for an appointment that day, but that

"due to lack of sufficient information" the Complainant was being required to use vacation time instead of "family leave". Paz reminded the Complainant of the requirement in her PIP that she schedule appointments outside of work hours when possible and obtain documentation from the provider when that was not possible. Paz further stated that documentation concerning the Complainant's next appointment for which she needed to take WFMLA leave (on December 10, 2018) would need to be submitted by that Friday (December 7, 2018), and that documentation relating to appointments on December 17 and 18, 2018, for which the Complainant had requested to take leave would have to be submitted by Friday, December 14, 2018, or the Complainant's leave requests might not be approved.

49. The Complainant replied to Paz's 10:15 a.m. email at 11:00 a.m. on December 5, 2018, describing her efforts to obtain the documentation Paz was demanding, and explaining that she was unable to get her children's health care providers to provide the requested documentation prior to upcoming scheduled appointments at which she was hoping to receive it. The Complainant explained that she was having difficulty persuading the health care providers to give her the requested documentation pertaining to each appointment, "because everyone [was] expecting this to be covered under the FMLA [she had] in place".

50. Also on December 5, 2018, the Respondent (Paz) issued a letter of reprimand to the Complainant for failing to follow the Respondent's leave request procedures and for leaving work without permission for L.C.'s appointment on the afternoon of November 20, 2018. In her letter, Paz stated that the Complainant was receiving the reprimand because, despite Paz's denial of the Complainant's family and medical leave request and the Complainant's having been told that she was needed for office coverage, the Complainant had "clocked out of Intellitime at 1:15 p.m. and left without notifying [Paz] or other co-workers, including [her] branch", and had, "failed to submit the leave request into the Circuit Courts Intranet System". Paz further stated in her letter:

You are again reminded to schedule personal appointments outside of work hours in so far as possible. When not possible, obtain prior documentation from the provider substantiating such claim and schedule appointments in the manner that causes the least disruption to court operations. Requests for leave must be submitted at least two business days in advance and may only be taken once approval is received from me or another supervisor.

Paz concluded her letter by stating that the Complainant's failure to follow all work rules and policies could result in further disciplinary action which could include termination of her employment.

51. The Respondent interfered with, restrained, and denied the Complainant's rights under Act when it denied her request to take WFMLA leave on November 20, 2018, to take her son to an appointment to care for his serious health condition.

52. The Respondent interfered with, restrained, and denied the Complainant's rights under the Act when it issued a reprimand to the Complainant for leaving work to take L.C. to his appointment on November 20, 2018, after having denied her request to take family and medical leave for the appointment.

53. The Respondent interfered with, restrained, and denied the Complainant's rights under the Act when it relied on the Complainant's having left work to take L.C. to his appointment on

November 20, 2018, to conclude that there was an "issue" concerning the Complainant's performance under her Performance Improvement Plan.

Based on the above Findings of Fact and Conclusions of Law, the Administrative Law Judge issues the following:

#### CONCLUSIONS OF LAW

1. The Respondent, Waukesha County, is a person and respondent within the meaning of the Act.
2. The Complainant, Marie Moran, is a person and complainant within the meaning of the Act.
3. The Complainant has proven by a preponderance of the evidence that the Respondent interfered with, restrained, and denied her rights under the Act when it denied her request to take WFMLA leave on November 20, 2018, to take her son to an appointment to care for his serious health condition.
4. The Complainant has proven by a preponderance of the evidence that the Respondent interfered with, restrained, and denied her rights under the Act when it issued her a written reprimand on December 5, 2018, for having left work to take her son to an appointment to care for his serious health condition on November 20, 2018.
5. The Complainant has proven by a preponderance of the evidence that the Respondent interfered with, restrained, and denied her rights under the Act when it relied on her having left work to take her son to an appointment to care for his serious health condition on November 20, 2018, to find that there was an "issue" concerning her performance under her Performance Improvement Plan.

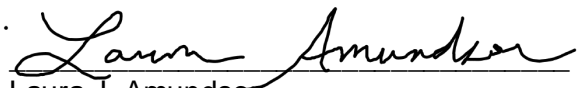
#### ORDER

1. The Respondent shall cease and desist from interfering with, restraining or denying the exercise of the Complainant's rights under the WFMLA.
2. The Respondent shall make the Complainant whole with respect to its unlawful denial of her request to take WFMLA leave on November 20, 2018, by doing the following:
  - i. Retroactively granting the Complainant's request to take WFMLA leave for an appointment to care for her son's serious health condition on November 20, 2018;
  - ii. Retroactively restoring the paid accrued leave the Respondent applied to cover the time the Complainant took from her workday to take her son to his appointment on November 20, 2018, to the paid accrued leave account from which it was deducted;
  - iii. Allowing the Complainant to designate whether she would like her retroactively-granted family and medical leave time for November 20, 2018, to be paid or unpaid, and to designate the type of accrued paid leave she elects

to use, if paid, making any corresponding pay adjustment needed in light of the designation chosen by the Complainant;

- iv. Withdrawing the written reprimand issued to the Complainant on December 5, 2018, pertaining to her having left work on November 20, 2018, to take her son to his appointment to care for his serious health condition, and removing any documentation regarding that reprimand from the Complainant's personnel file;
  - v. Reversing any adverse conclusions regarding the Complainant's performance under her Performance Improvement Plan that were based in whole or in part on her having left work on November 20, 2018, to take her son to his appointment to care for his serious health condition, and retroactively adjusting the Complainant's employment record to reflect that change.
3. The Respondent shall pay the Complainant's attorney fees and costs in this matter in the amount of \$60,382.12. The Respondent shall issue a check payable jointly to the Complainant and to her attorney, Christopher Kloth of McDonald & Kloth, LLC, in that amount, and shall deliver the check to the office of Attorney Kloth within 30 days of the date on which this decision becomes final. This amount shall be subject to 12% interest beginning in the quarter following that in which payment is due.
4. The Respondent shall file a compliance report detailing the actions it has taken to comply with this Order within 30 days of the date on which this Order becomes final. The compliance report shall be directed to the attention of Jim Chiolino, Director, Bureau of Hearings & Mediation, Equal Rights Division, Wisconsin Department of Workforce Development, P.O. Box 8928, Madison, Wisconsin 53708-8928.

Dated at Milwaukee, Wisconsin \_\_\_\_\_ February 16, 2021 \_\_\_\_\_

  
\_\_\_\_\_  
Laura J. Amundson  
Administrative Law Judge

Copy: Complainant  
Respondent, Attn: HR Director  
Christopher M. Kloth, Attorney for Complainant  
Mary E. Nelson, Attorney for Respondent

## MEMORANDUM

### INTRODUCTION

The Complainant filed her complaint with the Equal Rights Division on December 5, 2018, alleging that the Respondent violated the Wisconsin Family and Medical Leave Law, Wis. Stats. §103.10 (the WFMLA or the Act) by interfering with, restraining or denying her exercise of a right under that law to take family and medical leave to care for her children's serious health conditions.

Specifically, the Complainant alleged:

After my son was hospitalized 11/4/18, I needed time off for appointments which would have been covered under my FMLA. I was denied all the time off I needed. Since that time, I am being required to provide documentation for any and all appointments I am unable to schedule outside of work hours. Essentially, I am required to provide a doctor's note for all my appointments but it's being masked. Since this time, issues have been ongoing and I am on the verge of losing my job. There are additional issues but there is not enough room to fit it here.

Both parties in this matter were represented and engaged in pre-hearing information gathering and discovery. The parties thoroughly litigated issues relating to the Complainant's requests for and use of family and medical leave during her employment with the Respondent at hearing. The Respondent went well beyond any narrow construction of the issues in this matter, thoroughly presenting evidence regarding the Complainant's history of leave use and employment history with the Respondent.

The complaint is worded broadly enough to encompass potential violations of the Act relating to requested documentation and denial of WFMLA leave requests dating from November 4, 2018, through the complaint filing date, while the 30<sup>th</sup> day before December 5, 2018 (corresponding with the 30-day complaint filing period under the Act) was November 5, 2018. The Respondent was on sufficient notice of, and is subject to a potential remedy under the Act for, WFMLA violations relating to documentation requirements and denial of leave that occurred from November 5, 2018, through December 5, 2018, and adequately litigated any such issues at the hearing in this matter.

The Complainant bears the burden to prove by a preponderance of the evidence that the Respondent violated the Act as alleged in the complaint.

### ARGUMENTS

#### Complainant's Argument

The Complainant alleges that the Respondent ran afoul of the WFMLA by imposing a documentation requirement on the Complainant for family and medical leave requests that was stricter than that allowed by law, and by incorporating that unlawfully onerous requirement into a Performance Improvement Plan (PIP) that it imposed.

The Respondent also specifically denied the Complainant's legitimate requests to take leave under the Act, and then disciplined her for leaving work for a WFMLA-qualifying reason for which she had requested and been denied WFMLA leave.



Further, the Respondent violated the act by requiring the Complainant to substitute paid leave to cover absences for which she wanted to take unpaid WFMLA leave. Finally, the Respondent violated the Act when it failed to investigate the Complainant's internal complaint concerning her treatment by supervisors regarding her leave requests and by retaliating against her for opposing the Respondent's alleged WFMLA violations.

### Respondent's Argument

The Respondent counters that the Complainant had documented attendance and performance issues during her employment, and that she extensively utilized approved family and medical leave to care for her children beginning in June 2017.

The Respondent's denial of the Complainant's family and medical leave request(s) was legitimate and did not violate the Act. Further, the Respondent's December 5, 2018, letter of discipline relating to the Complainant's having left work to take her son to an appointment on November 20, 2018, after her request to take WFMLA leave to cover that appointment had been denied, was justified and did not violate the Act.

The Respondent contends that it did not deny the Complainant's November 20, 2018, request to take WFMLA leave because she failed to satisfy the documentation requirements concerning appointments scheduled outside of her working hours that was included in the Performance Improvement Plan (PIP) the Respondent imposed. In addition, the Respondent's documentation requirement, and the Respondent's implementation of the PIP that included that documentation requirement, did not violate the Act.

The Respondent argues that the remaining claims stated in the Complainant's argument fall outside the scope of the complaint and Initial Determination in this matter, and that the Administrative Law Judge therefore lacks authority to rule on them.

Further, the Complainant herself designated the paid or unpaid status of requested leave when she entered her leave requests into the Respondent's intranet system, and she was never required to use paid leave when she wished to take unpaid WFMLA leave.

Finally, the Respondent did not violate the Act by failing to investigate the Complainant's internal complaint about her treatment relating to her leave requests, or by retaliating against her because of any such complaint.

### DISCUSSION

#### Denial of the Complainant's Requests to Take WFMLA Leave from November 5<sup>th</sup> through December 5<sup>th</sup>, 2018

The Complainant had not exhausted her annual allotment of Wisconsin Family and Medical Leave as of the complaint filing date of December 5, 2018, and there appears to be no dispute that WFMLA-qualifying family and medical leave the Complainant requested to take in November and December 2018 would have been subject to the provisions of the Act.

#### **November 12, 2018**

The Complainant testified credibly that she would speak to a supervisor to get approval for leave requests before formally entering them into the Respondent's intranet program, that she spoke to

a supervisor regarding several requests to take leave for in-person appointments relating to her children's care, that verbal requests she made were denied, and that she would arrange to appear for appointments by telephone instead of in person whenever possible after her requests to leave work for appointments relating to her children's medical care were denied.

Specifically, within the timeframe relevant to the complaint, the Complainant spoke with Paz at some time during the week prior to a "family session" scheduled for L.C.'s care that was to take place on November 12, 2018, while he was an inpatient at Rogers Memorial Hospital. The Complainant testified that Paz denied her verbal request to leave for the appointment on November 12, 2018, because she had not provided documentation showing that it could not be scheduled outside of her work hours as required by the PIP the Respondent had imposed. The Complainant therefore arranged to appear for the appointment by telephone during her scheduled break time, and notified Paz of that arrangement. The call lasted beyond the Complainant's scheduled break time, she was rebuked for this, and the Respondent referenced the extended call as a shortcoming in notes concerning the Complainant's performance under her PIP.

The Complainant's un rebutted testimony concerning her request to take leave to attend an in-person appointment for L.C.'s care on November 12, 2018, raises the possibility that the Respondent may have violated the WFMLA in its handling of that request. However, there is insufficient evidence in the record as to exactly when the Complainant requested leave for the appointment on November 12, 2018, what information the Complainant provided to Paz at the time she made that request, and the full details of Paz's response to the request for the Administrative Law Judge to conclude that the Respondent's denial of that request violated the Act.

While it would appear that the circumstances of the Complainant's telephone appointment concerning L.C.'s care on November 12, 2018, may have qualified for WFMLA-protected leave, the Complainant failed to establish at hearing that she made an appropriate request for WFMLA leave, with adequate notice to the Respondent, concerning her November 12, 2018, telephone appointment for L.C.'s care, and it has not been established that the Respondent violated the Act with respect to the Complainant's need to take leave for that call.

In short, the Complainant has failed to prove that the Respondent violated the Act with respect to her need to take leave on November 12, 2018.

### **November 20, 2018**

Under Wis. Stat. §103.10(3)(b)3., an employee may take family leave under the Act to care for their child if the child has a serious health condition.

Wis. Stat. §103.10(3)(d) specifies that an employee may take family leave as "partial absence" from employment, and that an employee who does so must schedule partial absences in a manner that does not unduly disrupt their employer's operations.

Wis. Stat. §103.10(6)(b) further provides that if an employee needs to take family leave because of planned medical treatment for their child, or to take medical leave for their own planned medical treatment, the employee must:

1. Make a reasonable effort to schedule the medical treatment [...] so that it does not unduly disrupt the employer's operations, subject to the approval of the health care provider of the child [...] or employee.

2. Give the employer advance notice of the medical treatment [...] in a reasonable and practicable manner.

Wis. Stat. §103.10(6)(b)1.- 2.

Under Wisc. Admin. Code § DWD 225.02(3)(b), an employee shall be deemed to have scheduled partial absence for the reasons described in Wis. Stat. §103.10(3)(b)3. in a manner that does not unduly disrupt the employer's operations:

1. If the employee provides the employer with a proposed schedule for the leave with reasonable promptness after the employee learns of the probable necessity for the leave, and
2. Except where precluded by the need for health care consultation or treatment, if that proposed schedule is sufficiently definite that the employer is able to schedule replacement employees, to the extent replacement employees need to be scheduled, to cover the absence of the employee taking the leave.

Wisc. Admin. Code § DWD 225.02(3)(b).

Wis. Stat. §103.10(11)(a) prohibits an employer covered by the Act from interfering with, restraining, or denying an employee's exercise of any right provided under the Act.

In this case, the Complainant provided the Respondent with notice of her need to take WFMLA-qualifying leave on November 20, 2018, with reasonable promptness after she learned of the probable need for the leave on Saturday, November 17, 2018, mentioning it to Paz shortly after she arrived at work on Monday, November 19, 2018.

The Complainant made every effort on November 19, 2018, to have L.C.'s appointments for November 20 and 26, 2018, rescheduled to take place outside of her work hours, but she was unable to do so, as no other appointments were available during the weeks of November 18 and November 25, 2018.

Since L.C.'s health care provider was unable to find alternative appointment times for his necessary appointments outside of the Complainant's work hours during the weeks of November 18 and 25, 2018, the Complainant's ability to schedule L.C.'s first two aftercare appointments following his hospitalization in November 2018 in a manner that avoided any potential disruption to the Respondent's operations was precluded by L.C.'s need for health care consultation or treatment within the meaning of Wisc. Admin. Code § DWD 225.02(3)(b).

Once L.C.'s therapist's office informed the Complainant on November 19, 2018, that they did not have any appointments available for L.C. outside of the Complainant's work hours during the weeks of November 18 and 25, 2018, the Complainant updated Paz with this information and confirmed the exact times as to which she was requesting leave for November 20 and November 26, 2018, in her 2:53 p.m. email to Paz. The Complainant further explained in her email that she would be bringing in family and medical leave paperwork relating to those leave requests the next day, and did so, presenting the paperwork to Paz before their meeting on her PIP at 9:30 a.m. on November 20, 2018.

The Complainant's testimony stating that she first notified Paz on the morning of November 19, 2018, of her probable need to take leave on the afternoon of November 20, 2018, to care for

L.C.'s serious health condition was more credible than Paz's testimony that the Complainant first notified her of that request in her 2:53 p.m. email on November 19, 2018. Further, Paz testified that she would have denied the Complainant's leave request for November 20, 2018, regardless of when the Complainant made it, because she was needed for office coverage.

The WFMLA was not enacted solely to be used in circumstances where granting an employee's leave request would be convenient for an employer and the request would be granted regardless of the Act's provisions, but rather to require an employer to allow an employee to take leave in certain WFMLA-qualifying circumstances, even where the leave request at issue might not otherwise be granted.

The Complainant gave the Respondent advance notice of L.C.'s appointment for November 20, 2018, in a reasonable and practicable manner in the circumstances, and her request to take WFMLA-qualifying leave to care for L.C.'s serious health condition on November 20, 2018, complied with the notice requirements of the Act. The Respondent's denial of the Complainant's family and medical leave request for November 20, 2018, interfered with, restrained, and denied the Complainant's rights under the Act.

Similarly, the Respondent violated the Act when it issued a written warning/written letter of reprimand<sup>4</sup> to the Complainant on December 5, 2018, because she left work shortly after 1:15 p.m. on November 20, 2018, to take L.C. to an appointment to care for his serious health condition, as she had requested to in the leave request the Respondent unlawfully denied, and when it considered the Complainant's having left work for L.C.'s appointment on November 20, 2018, to be a shortcoming with respect to her performance under her PIP.

#### Respondent's Documentation Requirement Concerning Appointments Scheduled During Work Hours

One of the terms of the Performance Improvement Plan the Respondent imposed on the Complainant on November 9, 2018, required her to provide documentation from a health care provider prior to any appointment scheduled during work hours for which was she was requesting leave, verifying that the appointment could not be scheduled outside of her work hours.

The Respondent argues that the documentation requirement was put into place (according to Paz's testimony) because the Complainant had verbally tried to request "family leave" for at least one (guardian *ad litem*) appointment that would not have been WFMLA-qualifying, while also positing that the Respondent only was requiring the Complainant to provide one note from each care provider stating generally that they would not schedule evening appointments (which would not have provided the Respondent with any information verifying whether a given appointment was or was not for a WFMLA-qualifying purpose).

The Complainant argues that the documentation requirement amounted to an unlawful certification requirement concerning the Complainant's need for WFMLA leave in violation of the Act.

If an employee requests to take family leave to care for their child with a serious health condition under §103.10(3)(b)3., or to take medical leave to care for their own serious health condition, their

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<sup>4</sup> The letter itself says "Written Warning" in its reference line, while the body of the letter informs the Complainant: "You are being issued this written letter of reprimand for failure to follow our leave request procedure and for insubordination".

employer may require them to provide "certification" of their need for leave as defined in Wis. Stat. §103.10(7)(b). §103.10(7)(b) provides, in its entirety:

(b) No employer may require certification stating more than the following:

1. That the child, spouse, domestic partner, parent, or employee has a serious health condition.
2. The date the serious health condition commenced and its probable duration.
3. Within the knowledge of the health care provider or Christian Science practitioner, the medical facts regarding the serious health condition.
4. If the employee requests medical leave, an explanation of the extent to which the employee is unable to perform his or her employment duties.

The documentation requirement the Respondent imposed as part of the Complainant's PIP appears on its face to apply broadly to the Complainant's requests to take leave during the work day, potentially including, but not necessarily limited to her requests to take WFMLA leave.

Whether the Respondent sought to require the Complainant to provide documentation regarding the availability of appointments outside of work hours one time for each of the Complainant's children's medical providers, or for each appointment as to which the Complainant requested leave, the Administrative Law Judge in this matter finds that a potential violation of the Act would accrue when an employee's right to take WFMLA-qualifying leave was curtailed or otherwise affected by the documentation requirement, or when the Complainant suffered some other adverse employment consequence for failing to comply with the requirement in the context of a legitimate request for WFMLA leave.

Paz testified at hearing that the Respondent did not deny the Complainant's request to take leave on November 20, 2018, because she had failed to comply with the documentation requirement in her PIP. That testimony seems to be at odds with the fact that supervisors' notes in the Record of Conversation/Notice for their November 20, 2018, meeting on the Complainant's PIP, explaining their denial of the Complainant's family and medical leave request for November 20, 2018, appear under the heading relating to the Complainant's compliance with that documentation requirement, and identify the Complainant's failure to comply with that requirement as an "issue" as to her performance under the PIP. Paz also references the documentation requirement in her December 5, 2018, letter reprimanding the Complainant for having left work to take L.C. to his appointment on November 20, 2018, after her family and medical leave request had been denied.

Nevertheless, while the Respondent's protestations that it did not rely on the documentation requirement in the Complainant's PIP when it denied her leave request for November 20, 2018, are less than convincing, the record remains ambiguous as to the degree to which the Respondent denied the Complainant's request to take leave on November 20, 2018, because she failed to satisfy that documentation requirement, as opposed to other reasons for the denial articulated by the Respondent in various communications.

The Complainant has failed to establish conclusively that the PIP's documentation requirement led to the Respondent's denial of her leave request for November 20, 2018.

Further, with respect to the relevant time period of November 5<sup>th</sup> through December 5, 2018, the evidence in the record fails to clearly establish any instance in which the Complainant made a

timely request for leave, and communicated sufficient information to the Respondent to notify them that she was requesting leave for a WFMLA-qualifying purpose, but the Respondent denied the Complainant's WFMLA leave request specifically because she had not complied with the documentation requirement in her PIP.

The Administrative Law Judge also declines to find that the documentation requirement as articulated in the Complainant's PIP was a *per se* violation of the Act.

Therefore, the Administrative Law Judge finds that the Complainant has failed to prove that the Respondent violated the Act with respect to the documentation requirement for leave requests that was included in the Complainant's PIP.

#### The Respondent's Substitution of Paid Leave for Unpaid WFMLA Leave Requested by the Complainant

The complaint in this matter did not clearly state an allegation of improper substitution of paid leave for unpaid WFMLA leave, nor was any such allegation addressed in the Initial Determination or certified for hearing.

Further, the evidence in the record conclusively establishes only one instance (regarding the Complainant's leave request for November 20, 2018) in which the Respondent forced the Complainant to use paid leave in place of duly requested WFMLA-qualifying leave during the period of November 5 through December 5, 2018. In that instance, the Respondent denied the Complainant's WFMLA leave request entirely, and covered the Complainant's partial absence on November 20, 2018, with paid leave.

The record in this matter fails to conclusively establish any instance from November 5 through December 5, 2018, where the Complainant used WFMLA leave, and the Respondent improperly substituted paid leave while the Complainant wished to take unpaid WFMLA leave. Therefore, the Complainant has failed to prove that the Respondent violated her WFMLA substitution rights in this matter.

#### Allegation that the Respondent Violated the Act by Failing to Investigate the Complainant's Internal Complaint Regarding the Respondent's Processing of Her Leave Requests and by Retaliating Against Her Because of that Complaint

The complaint in this matter contained no allegation concerning the Respondent's failure to investigate the Complainant's internal complaint about her treatment relating to her leave requests, and no such allegation was addressed in the Initial Determination or certified for hearing. Similarly, the instant complaint did not state any retaliation allegation, and no such allegation was investigated or certified for hearing in this case.

Therefore, the Administrative Law Judge makes no finding with respect to the Complainant's internal complaint regarding the treatment of her leave requests or her claim of retaliation relating to that complaint.

#### CONCLUSION

The Respondent violated the Act when it denied the Complainant's request to take a partial day of WFMLA leave on November 20, 2018, to care for her son's serious health condition, and when it subjected her to adverse employment consequences, including a letter of reprimand and

adverse findings as to her performance under a Performance Improvement Plan, because she left work to take her son to his appointment following the Respondent's unlawful denial of her family and medical leave request.

The Respondent is ordered to make the Complainant whole for those violations as set forth herein.

#### ATTORNEY'S FEES AND COSTS

The Complainant filed a Petition for Attorney's Fees and Costs and supporting documents on September 16, 2020. The Respondent filed a response, and the parties filed surresponses to each other's submissions, the last of which was received on December 18, 2020.

The Complainant's initial fee petition requested \$58,650.00 in attorney fees and \$1,012.12 in costs incurred in this matter.

In its initial response to the fee petition, the Respondent indicates that it is not disputing the Complainant's calculation of \$1,012.12 in costs incurred or contesting the Complainant's attorney's compensation rate of \$300.00 per hour, and also notes that by its own calculation, the Complainant's claimed attorney fees at the stated rate would total \$59,940. However, the Respondent argues that the amount of the Complainant's claimed fees and costs should be reduced by at least 70 percent due to the Complainant's "limited success on the merits" in this case. The Respondent further contends that Complainant's counsel spent an excessive amount of time on numerous tasks during his representation of the Complainant, and that he provided insufficient detail or explanation of the work performed with respect to various entries in the fee petition.

In her replies to the Respondent's response to the fee petition, the Complainant argues that, contrary to the Respondent's representations, the Complainant entirely prevailed on her claim of interference with and denial of her rights under the WFMLA. Further, the Complainant's attorney provided sufficient details regarding work performed in the fee petition, and the amount of time spent on the representation was reasonable.

In her final reply to the Respondent's response to the fee petition, the Complainant also requests an additional \$2,520.00 in attorney fees relating to the petition. The Respondent indicates in its final response that it does not contest the amount of \$2,520.00 in fees incurred by the Complainant in relation to the petition, while it also requests that that amount be subject to the same minimum 70 percent reduction as the overall fees and costs requested by the Complainant.

Upon reviewing the time records submitted by Complainant's counsel with the fee petition, the Administrative Law Judge finds that the Complainant's counsel provided sufficient detail concerning the work performed in the petition, and that the amount of time he spent in representing the Complainant in this matter appears to be reasonable, so there will be no reduction in the requested fees or costs on the basis that excessive time was spent on the representation.

In addition, the Administrative Law Judge finds that the Complainant substantially prevailed on her claim concerning the denial of and interference with her WFMLA rights set forth in the complaint, and will assess no overall percentage reduction in the fees and costs requested based on partial success.

In the complaint (which, according to Complainant's counsel, she filed prior to obtaining

representation) the Complainant alleged:

After my son was hospitalized 11/4/18, I needed time off for appointments which would have been covered under my FMLA. I was denied all the time off I needed. Since that time, I am being required to provide documentation for any and all appointments I am unable to schedule outside of work hours. Essentially, I am required to provide a doctor's note for all my appointments but it's being masked. Since this time, issues have been ongoing and I am on the verge of losing my job. There are additional issues but there is not enough room to fit it here.

The Complainant prevailed in substantiating her claim concerning the Respondent's denial of and interference with her rights under the WFMLA when she proved that the Respondent unlawfully denied her request for WFMLA leave on November 20, 2018, and unlawfully subjected her to a written reprimand on December 4, 2018, because she took her son to his needed medical appointment on November 20, 2018, notwithstanding the (unlawful) denial of her leave request.

At hearing, the Respondent presented extensive information concerning the Complainant's past use of leave and attendance and disciplinary history, including with respect to an unauthorized extended phone call the Complainant made regarding her son's medical care on November 12, 2018. The Complainant responded with testimony explaining her actions regarding the November 12, 2018, phone call, including the fact that she had requested to bring her son to a needed medical appointment in person on that date, but then had arranged to speak with hospital staff by telephone instead of appearing for the appointment in person after her leave request was denied. *Sua sponte*, the Administrative Law Judge opined in the Memorandum above that the denial of the Complainant's leave request for November 12, 2018, might have constituted an additional factual basis substantiating the Respondent's denial of and interference with the Complainant's rights under the WFMLA. However, the Complainant did *not* spend time at hearing presenting details of the manner in which she requested leave for November 12, 2018, or of how the Respondent responded to any such request, so that the Administrative Law Judge declined to find that events surrounding any leave request for November 12, 2018, constituted an additional factual basis substantiating the Respondent's violation of the Complainant's WFMLA rights. This does not mean that the Complainant failed to entirely prevail on her claim concerning the denial of and interference with her rights under the WFMLA.

The Complainant argued in posthearing briefs that the Respondent's documentation requirements regarding her leave requests provided an additional basis on which to find that her WFMLA rights had been violated. The Complainant also argued that the Respondent interfered with her WFMLA rights by requiring her to use accrued paid leave instead of unpaid WFMLA leave and by failing to adequately investigate complaints she brought to the attention of the Respondent's human resources staff concerning the handling of her leave requests. Again, while those arguments did not prevail, that does not mean that the Complainant did not entirely succeed in proving her claim of unlawful denial of and interference with her rights under the WFMLA.

In short, the Complainant was not required to have proven additional factual bases substantiating the Respondent's unlawful denial of and interference with her WFMLA rights besides those relating to her leave request for November 20, 2018, to have entirely prevailed on her complaint for purposes of the fee petition.

However, as the Respondent points out in its argument and shows in attached exhibits, the Complainant did pose an interrogatory in prehearing discovery and made arguments in her posthearing brief relating to retaliation that were outside the scope of the complaint in this matter.



The Administrative Law Judge considers six hours to be a generous estimate of the time the Complainant's attorney spent to draft the interrogatory concerning retaliation and review any response to that interrogatory, and to engage in hearing preparation, ask questions of witnesses at hearing, and draft arguments in posthearing briefs on matters relating solely to a claim of retaliation, and not to the denial and interference claims at issue in this complaint. Accordingly, the Complainant's attorney fees award will be reduced by \$1,800.00 (the equivalent of six hours at the rate of \$300.00 per hour).

Notwithstanding the Respondent's having suggested that by its calculations, the Complainant would appear to have incurred a claimed \$59,940.00, not the requested \$58,650.00, in attorney fees prior to the fee petition, the Complainant did not accede to that amount in her replies to the Respondent's response to the fee petition or revise her fee request accordingly. Therefore, the Administrative Law Judge begins with the Complainant's original request for \$58,650.00 in fees incurred prior to the fee petition in calculating the amount to be awarded.

Accordingly, the Complainant is awarded \$58,650.00 in attorney fees incurred prior to the filing of the fee petition, minus \$1,800.00 in fees relating to discovery and litigation pertaining to retaliation; \$1,012.12 in costs; and \$2,520.00 in attorney fees incurred in pursuing the fee petition, for a total award of \$60,382.12.

## Compliance Report Checklist

[To be completed by Respondents in Fair Employment, Family & Medical Leave Cases, or Cases Filed Under Sec. 106.54, Stats.]

1. **The Respondent has been ordered to file a compliance report. The compliance report should include all of the items listed below which are applicable to this case. The Respondent must submit a compliance report within thirty (30) days of the date the final order was issued in this case. The report should be sent to:**

JIM CHIOLINO  
EQUAL RIGHTS DIVISION  
P.O. BOX 8928  
MADISON, WI 53708

If you need assistance preparing this form, please contact Mr. Chiolino at 608-266-3345.

2. **Back Pay:** If the Respondent has been ordered to pay the Complainant back pay, please calculate the amount of back pay due on the reverse side of this form. If applicable, indicate the hourly wage and the number of hours per week which were used to compute the gross back pay due. **Enclose a copy of the check(s) sent to the Complainant which the Respondent asserts satisfies the back pay order.**

If the Respondent has been ordered to withhold unemployment insurance (UI) benefits or welfare benefits from the Complainant and to repay those benefits to the Unemployment Compensation Reserve Fund or an applicable welfare agency, please include a check for the UI benefits. The check should be made out to "DWD." If applicable, include a copy of the check sent to the welfare agency.

3. **Reinstatement or Order to Hire:** If the Respondent has been ordered to reinstate or hire the Complainant, please indicate when the reinstatement offer (or the offer to hire) was made and whether the Complainant accepted the offer. The Respondent should allow the Complainant a reasonable amount of time to decide whether or not to accept the offer.

If the Complainant has **accepted** the offer, please indicate when the Complainant began work. If the Complainant has **rejected** the offer, indicate the job title, the hours and the rate of pay for the position that was offered, along with the date when the Complainant rejected the offer, and a copy of the Complainant's rejection of the offer (if the rejection was in writing).

4. **Benefits:** If the Respondent has been ordered to pay the Complainant benefits (such as reimbursing a pension account, crediting or restoring seniority, crediting vacation time or sick leave, or other remedial actions related to the Complainant's benefits), **please provide information demonstrating that the remedial action(s) has been taken.**
5. **Attorney's Fees and Costs:** If the Respondent has been ordered to pay the Complainant's attorney's fees and costs, please provide a copy of the check which was sent to the Complainant's attorney in compliance with this order.
6. **Other Remedial Actions:** If the Respondent has been ordered to take any other remedial actions (such as providing training, posting a notice, or removing items from the Complainant's personnel file), please provide information demonstrating that the Respondent has complied with this portion of the order.

## Worksheet for Computing Back Pay and Interest on Back Pay

		Calendar Quarter		Calendar Quarter		Calendar Quarter		Calendar Quarter		Calendar Quarter		Calendar Quarter	
		Start	Ends	Start	Ends	Start	Ends	Start	Ends	Start	Ends	Start	Ends
1	<b>Gross Back Pay:</b> Enter the gross wages that would have been paid to Complainant in this quarter had the unlawful act not occurred.												
2	<b>Statutory Set-Offs:</b> Enter the gross wages that the Complainant actually received from other employment, unemployment compensation or welfare benefits during this quarter.												
3	<b>Net Back Pay:</b> Subtract line 2 from line 1 and enter the difference. (If line 2 is more than line 1, enter zero here and on line 9. No payment is due for this quarter).												
4	<b>Ending Date:</b> Enter the date that the Respondent is expected to make payment to the Complainant. (Use the same date for each quarter.)												
5	<b>Term:</b> Enter the number of days from the end of each quarter to the date payment is expected to be made (from line 4).												
6	<b>Interest Factor:</b> Divide line 5 by 365 days and enter that amount here. Round up two decimal places.												
7	<b>Interest Rate:</b> Multiply the factor on line 6 by 12% and enter the result here.												
8	<b>Interest Due This Quarter:</b> Multiply the amount on line 3 by the percent on line 7 and enter the result here.												
9	<b>Total Due This Quarter:</b> Add lines 3 and 8 and enter the result here. This is the total back pay and interest due this quarter.												
10	<b>Total Payment Due:</b> This is the <b>cumulative</b> total of the calendar quarters on line 9.												

**Notes**

1. Excesses in statutory set-offs in one quarter may not be carried over to another quarter.
2. Interest is not payable for the quarter in which the ending date falls (i.e., the last quarter of the back pay period).
3. This worksheet reflects the provisions of sec. DWD 218.20(4), Wisconsin Administrative Code.