

STATE OF WISCONSIN
DEPARTMENT OF WORKFORCE DEVELOPMENT
EQUAL RIGHTS DIVISION

██████████
██████████
██████████

Complainant

**NON-FINAL DECISION AND
ORDER**

v.

WEA Trust
45 Nob Hill Rd.
Madison, WI 53713

ERD Case No. CR200700007

Respondent

On January 3, 2007 the Complainant, ██████████ filed a complaint with the Equal Rights Division (ERD) against WEA Trust, alleging that it had violated the Wisconsin Family and Medical Leave Act (WFMLA) when it notified her on December 4, 2006 that that her employment was being terminated in part due to not meeting the employer's expectations regarding attendance. The Equal Rights Officer to whom the complaint was assigned issued an Initial Determination on February 15, 2007 finding probable cause to believe that WEA Trust may have violated the WFMLA, in that Ms. ██████████'s request for medical leave under the WFMLA may have been a factor in the employer's termination of her employment. The case was therefore certified for a hearing on the merits.

The hearing took place on May 11, 2007 in Madison, Wisconsin before Administrative Law Judge John L. Brown. Ms. ██████████ was present and was represented by Attorney Tamara B. Packard of the law firm Cullen Weston Pines & Bach of Madison. WEA Trust was present and was represented by its Chief Human Resources Officer, Bob Ceder. The evidentiary record was closed on May 11, 2007 and the parties submitted post-hearing briefs. The case has been ready for decision since June 19, 2007.

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

FINDINGS OF FACT

1. WEA Trust is in the business of providing retirement insurance and investment services to Wisconsin public school employees. It has a permanent workforce in excess of 50 individuals at its location in Madison, Wisconsin.

2. ██████████ became an employee of WEA Trust on or about April 17, 2000. She was employed continuously by WEA Trust on a full-time basis until December 4, 2006. At any given time of her employment during 2006 she had worked at least 1000 hours in the immediately preceding 52 weeks. Throughout her employment, the position ██████████ held was building assistant in the facility department.
3. ██████████'s duties included setting up rooms for meetings, which at times required such tasks as moving furniture, setting up equipment and providing refreshments, and putting the rooms back in order after meetings. ██████████ also maintained the kitchenettes in the building and did general cleaning of the building and the grounds. She also maintained the grounds (including lawn mowing and snow removal) and ran errands.
4. ██████████'s supervisor was Scott Riddle. Riddle's supervisor was Ed Helmke.
5. On or about May 17, 2006 Riddle gave ██████████ an annual performance appraisal form which he had completed (Ex. 2). The performance appraisal form listed five expectations and a result for each one, indicating whether ██████████ had fully met the expectation, met it most of the time, or failed to meet it. Riddle indicated that ██████████ had met each of the five expectations most of the time. One of the expectations was "[a]biding by prescribed work rules by meeting punctuality and attendance standards." The result for this expectation stated: "Meets the expectation most of the time. During this review period, you had six unscheduled absences for a total of 61 hours."¹
6. The performance appraisal form also included a section on expectations to be met in the coming year. Regarding attendance, the expectation was: "Abide by departmental expectations regarding attendance and punctuality standards. To fully meet the expectation, you must report to work at your scheduled start time and have 40 hours or less and 5 occurrences or less in a 12-month evaluation period." (Ex. 2).
7. The type of absence for which WEA Trust disciplined its employees was known as an "unscheduled" or "unplanned" absence. Absences that WEA Trust approved in advance, known as "planned" absences, were not grounds for discipline. WEA Trust kept track of whether its employees' absences were planned or unplanned on its employee website. (Ex. 23). For any absence it approved for WFMLA or FMLA, its policy was to designate that absence as a planned absence on the employee website.

¹ The 61 hours of unplanned leave actually included 8 hours that were incurred on April 21, 2006, four days after the close of the annual review period. (Ex. 23).

8. Under the heading "Staff Development" on the performance appraisal form (Ex. 2), Riddle wrote the following:

Although you have shown some improvement in the last 3 months, this appraisal documents that you are still not fully meeting your position's expectations. I am willing to see if you are able to make the necessary improvements over the next 6 months to fully meet these expectations. Please let me know if you have any questions at all about the changes you are expected to make, because your success or failure in making these changes will determine what happens. If your performance and behavior do not progressively and substantially improve during this time, then this will place your employment at risk and may result in the end of your employment at the Trust due to your failure to consistently meet your position's expectations. ██████, you have had sufficient opportunity in the past to correct the identified problems. This amounts to a final chance to fully perform in your position.

9. ██████ was absent from work from Tuesday, May 30, 2006 through Friday, June 2, 2006, missing a total of 32 hours. She requested medical leave for this period of absence, and provided a medical certification form from health care provider Don Buckstein, certifying that ██████ had a serious health condition that began on May 28th and had a probable duration through June 5th, and that she was seen and treated on an outpatient basis on May 30th and was to be seen for future testing if her condition persisted. (Ex. 4, 5, 23). Buckstein indicated that the medical facts regarding ██████'s condition were: "Severe headaches, joint aches, muscle fatigue, nausea, diarrhea [sic], bronchial inflammation, sinusitis, allergic rhinitis." (Ex. 5). Buckstein also indicated that ██████ would need to take leave on an intermittent basis for flare-ups of allergic symptoms or for medical appointments. (Ex. 5).
10. On June 27, 2006, Susan Jahn, Senior Human Resources Specialist for WEA Trust, approved ██████'s request for medical leave for the period May 29 through June 2. (Ex. 6). The 32 hours from May 30 through June 2 were logged on WEA Trust's tracking system as planned absences (May 29th was a holiday).
11. ██████ was then absent from work for 7 hours on July 14, 2006. She reported to Jahn that she was absent because of a flare-up of her allergies. Jahn told her that if she had an illness that was frequent, she might be able to get a medical certification that would allow her to take medical leave for intermittent absences due to that illness for up to a year, without having to get a new certification for each absence.

12. ██████ submitted a medical leave request to WEA Trust on July 17, 2006 indicating that she would be absent from work intermittently. (Ex. 8). Her health care provider, Don Buckstein, submitted another medical certification form to WEA Trust on or about July 18, 2006. The certification form did not provide specific dates for a serious health condition, but instead stated that ██████ had a serious health condition on an intermittent basis in 2006, that would be ongoing through the year. His list of medical facts about the condition was the same as it had been in June. (Ex. 7).
13. ██████ was also absent from work for her 8-hour shifts on August 8 and August 9, 2006, and was absent for 30 minutes on August 10, 2006. The absences on August 8th and 9th were due to an allergy flare-up, and the half-hour on August 10th was for an appointment with her doctor. ██████ requested her employer to approve those absences as medical leave.
14. Later in the summer or fall of 2006, ██████ noticed from the WEA Trust employee website that her absences on July 14 and August 8, 9 and 10 were marked "FMLA pending," and she asked Jahn why. Jahn told her that she needed more information from ██████'s health care provider.
15. On or about November 2, 2006 ██████ obtained a letter from her physician, Reid Olson, M.D., concerning her request for medical leave. (Ex. 9). The letter stated:

Ms. ██████ has perennial allergic rhinitis and is currently receiving medication therapy as well as allergy immunotherapy to help control this further. She tends to develop rather significant debilitating symptoms when she incurs viral respiratory disease, often leaving her with rather significant myalgias, headaches, and sometimes fever as well as fatigue and nausea. This may at times necessitate 3 to 5 days of absence from work. I would not anticipate it happening more than 2 to 3 times per year and hopefully less. I hope that this will further clarify any questions or concerns but if not, please do not hesitate to call or contact me.
16. ██████ gave this letter to Jahn. Jahn told her that she was going to have an in-house medical advisor review the information and decide whether ██████'s condition was serious enough to be approved for medical leave for the July and August 2006 absences. Eventually, Jahn came to the conclusion that because of ██████'s prior history of absences for similar reasons, her absences on July 14 and August 8, 9

and 10 qualified as intermittent medical leave. Prior to ██████'s discharge on December 4, 2006, however, Jahn did not communicate this decision to ██████, did not change the employee website to indicate that those absences were "planned" as opposed to "unplanned," and did not inform Riddle or Riddle's supervisor, Ed Helmke, of this decision.

17. ██████'s absences on July 14 and August 8, 9 and 10, 2006, totaling 23.5 hours, were for a serious health condition that prevented ██████ from being able to perform her job duties, and that required continuing treatment from a health care provider. ██████'s notification of the condition to WEA Trust was reasonably calculated to advise it of her request for medical leave under the WFMLA for the absences, and of the reason for the request.
18. In October 2006 ██████ was seeing a podiatrist, Dr. Neal Katz, concerning a problem with pain in her heels. She was seen by Dr. Katz on October 3, 12, 13 and 16, 2006. She was granted time off work for these appointments, and her employer considered this time off to be "planned."
19. During ██████'s appointment on Monday, October 16th, Dr. Katz advised her to stay off her feet for the remainder of the week. He wrote a note for her stating that she was to use crutches and refrain from working for the week. (Ex. 10).
20. ██████ notified Riddle that she would not be at work on Tuesday, Wednesday and Thursday, October 17, 18 and 19, because of Dr. Katz's advice that she stay off her feet. ██████ had already been given Friday, October 20th off as a planned vacation day.
21. On Tuesday, October 17th, Jahn telephoned ██████ and asked her to see if Dr. Katz would release her to do sedentary work. ██████ was unable to do this because Dr. Katz started a vacation that day, and there was no one in his office qualified to release her for sedentary work. At Jahn's request, ██████ tried to contact her regular physician to get a release, but was unable to reach her. By Thursday, October 19th, Jahn told ██████ it was okay to stop trying to get a release for sedentary work.
22. In late October 2006, ██████ brought the note from Dr. Katz (Ex. 10) to Jahn, and asked to fill out FMLA forms for her absence on October 17, 18 and 19. Because Jahn believed that ██████ could have done sedentary work during this time, she refused to give ██████ the FMLA forms, and said that whether the absences would be planned or unplanned would be left up to her supervisor, Riddle.

23. ██████'s absences on October 17, 18 and 19, 2006, totaling 24 hours, were for a serious health condition that prevented ██████ from being able to perform her job duties, and that required continuing treatment from a health care provider. ██████'s notification of the condition to WEA Trust was reasonably calculated to advise it of her request for medical leave under the WFMLA for the absences, and of the reason for the request.
24. ██████ was also absent from work from November 6 to November 10, 2006 for a hospitalization, and was absent for 3.5 hours on November 16, 2006 for a follow-up visit related to the hospitalization. WEA Trust approved of this time, totaling 43.5 hours, as medical leave under the WFMLA.
25. In addition to all the absences described in the above Findings, since May 17, 2006 ██████ had an unplanned absence of .25 hours on August 17, 2006 for tardiness in getting to work, and an unplanned absence of 8 hours on September 29, 2006 for an illness that was not a serious health condition, and no other unplanned absences.
26. On December 4, 2006 ██████ was called to Helmke's office. There she met with Helmke and Riddle. Helmke gave her a memo informing her that her employment was being terminated immediately. (Ex. 1). In summarizing the reasons for dismissal, the memo stated:

Despite providing you with clear performance expectations through our ongoing discussions, memoranda, and e-mail, you have not been willing to correct these problems and continue to fail to:

- Communicate effectively with your manager about work and assignments, including significantly reducing or eliminating nonwork, unproductive personal conversations with employees.
- Meet our department expectations regarding work attendance.

Additionally, you have not made substantive improvements in one other area:

- Complete assigned tasks in a timely manner when clear deadlines have been established and clearly communicated to you.

27. WEA Trust's termination of ██████'s employment was motivated at least in part by the following absences she incurred that qualified for

medical leave under the WFMLA: 23.5 hours from July 14 through August 10, 2006; 24 hours from October 17 through October 19, 2006. If those absences had not been a motivating factor in WEA Trust's decision to terminate ██████████'s employment, her employment would not have been terminated.

28. As of the date of her termination, ██████████'s annual salary at WEA Trust was \$34,948.16. (Ex. 17). Her hourly rate was \$16.80 and she was eligible to receive time-and-a-half for overtime.
29. After ██████████ was terminated from her employment at WEA Trust, she received unemployment insurance totaling \$7,305 through April 28, 2007. (Ex. 18).
30. On April 30, 2007 ██████████ began working at ██████████. Her hourly rate was \$17.50.

Based on the above Findings of Fact the Administrative Law Judge makes the following:

CONCLUSIONS OF LAW

1. WEA Trust was an employer as defined in the Wisconsin Family and Medical Leave Act (WFMLA).
2. ██████████ was an employee of WEA Trust within the scope of the WFMLA as set out in sec. 103.10(2) during calendar year 2006.
3. ██████████ has shown by a preponderance of the evidence that she was entitled to medical leave under the WFMLA for absences of 23.5 hours from July 14, 2006 through August 10, 2006 and 24 hours from October 17, 2006 through October 19, 2006.
4. ██████████ has shown by a preponderance of the evidence that WEA Trust terminated her employment in part because of absences that she took that qualified for WFMLA; and no substantial evidence was provided showing that WEA Trust still would have terminated her employment if it had not been motivated by her absences of July 14, August 8, 9 and 10, and October 17, 18 and 19, 2006.
5. ██████████ has shown by a preponderance of evidence that WEA Trust's termination of ██████████'s employment violated the WFMLA because it interfered with, restrained or denied the exercise of a right under the WFMLA.

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

ORDER

1. That the Respondent cease and desist from violating [REDACTED]'s rights under the WFMLA, and shall not retaliate against [REDACTED] for exercising her rights under the WFMLA.
2. That Respondent shall make an unconditional written offer of reinstatement to the Complainant offering her the position that she held on her last day on the job for the Respondent. The offer shall give the Complainant reasonable notice of the time and place at which she is to appear for work if she chooses to accept the offer. The offer shall entitle the Complainant to the wage rate and benefits, including any sick leave, vacation, holiday pay, pension benefits and other benefits of employment, to which she would presently be entitled had she not been discharged from employment, including annual raises. The Complainant shall be entitled to have seniority in accordance with her first date of hiring. The Respondent shall reinstate the Complainant unless the Complainant notifies the Respondent that she does not wish to be reinstated, or she unreasonably fails to appear for work at the time and place designated by the Respondent in its offer of reinstatement.
3. That the Respondent shall make the Complainant whole for all losses of pay and benefits, including any raises, that the Complainant has suffered by reason of its unlawful termination of her employment by paying her the amount she would have earned as an employee from her last date of paid employment at the Respondent to the earlier of the date the Complainant is reinstated or the date that she indicates to the Respondent that she is declining reinstatement. The amount of back pay shall be offset by any interim earnings received during each calendar quarter, including her earnings at [REDACTED]. Any unemployment or welfare benefits received by the Complainant for any pay period shall not reduce the amount of back pay liability, but that amount shall be withheld by the Respondent and paid to the Unemployment Insurance Reserve Fund and/or to the applicable welfare agency (reimbursement of unemployment insurance should be in the form of a check and made payable to the Department of Workforce Development, and should include the Complainant's name and social security number, and the ERD case number).
4. That the amount payable to the Complainant after all statutory setoffs have been deducted shall be increased by interest at the rate of 12 percent per annum, simple. For each calendar quarter, a separate amount of back pay due shall be computed, then interest shall be

computed on each quarterly amount from the last day of each calendar quarter to the date of payment (see worksheet attached).

5. That the Respondent shall pay to the Complainant reasonable and actual attorney's fees and costs in this matter. Fees and costs shall be paid by check and shall be made out jointly to [REDACTED] and the Cullen Weston Pines & Bach Law Firm Trust Account.
6. That within 30 days after the date this Order becomes final, the Respondent shall file a compliance report with the Equal Rights Division detailing the actions it has taken to comply with this Order, including all computations used to arrive at a determination of the amount of back pay and interest owed to the Complainant. The compliance report shall be directed to the attention of Mr. Robin Barkenhagen, Equal Rights Division, P.O. Box 8928, Madison, Wisconsin 53708.

Dated at Milwaukee, Wisconsin _____

John L. Brown
Administrative Law Judge

cc: [REDACTED], Complainant
WEA Trust, Respondent
Tamara B. Packard, Attorney for Complainant
Bob Ceder, Representative for Respondent

A brief memorandum will be added to the final version of this Decision and Order.