COURT OF APPEALS
DECISION
DATED AND FILED

March 20, 2008

David R. Schanker
Clerk of Court of Appeals

Appeal No. 2007AP943 **Cir. Ct. No. 2005SC2002**

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

PORT EDWARDS SCHOOL DISTRICT,

PLAINTIFF-RESPONDENT-CROSS-APPELLANT,

V.

BECKY REISSMANN,

DEFENDANT-APPELLANT-CROSS-RESPONDENT.

APPEAL and CROSS-APPEAL from a judgment of the circuit court for Wood County: JAMES M. MASON, Judge. *Modified and, as modified, affirmed.*

¶1 BRIDGE, J.[1] Becky Reissmann appeals a circuit court judgment allowing the Port Edwards School District (the District) to recoup health insurance

[1] This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(a) (2005-06).

premiums paid on her behalf while she was on leave during her pregnancy. Reissmann contends that the District is barred from recovery under the Wisconsin Family and Medical Leave Act (FMLA) and also by federal regulations issued under the federal FMLA. We disagree and affirm the circuit court.

¶2 The District cross-appeals the circuit court's judgment denying it recovery of premiums paid on Reissmann's behalf after she resigned her position. The District contends that Reissmann was unjustly enriched by the premium payments and therefore she should be required to repay the premiums paid after her FMLA leave ended. We disagree and affirm.

BACKGROUND

¶3 The facts in this matter are not in dispute. The parties agreed to a Stipulation of Facts that was submitted to the circuit court. Becky Reissmann was a teacher in the Port Edwards School District, and, as of April 2004, was eligible for leave under the Wisconsin FMLA. WIS. STAT. § 103.10 (2003-04).[2] Reissmann took leave from April 28, 2004 through June 10, 2004. Because of her accumulated paid leave, she was on unpaid leave for only nineteen days of the leave. June 10, 2004 was the last work day for teachers in the 2003-04 school year.

¶4 At the time that Reissmann went on leave, she intended to return to employment with the District the following school year. However, circumstances

[2] All references to the Wisconsin Statutes are to the 2003-04 version unless otherwise noted.

changed and on July 13, 2004, she informed the District that she would not be returning to employment for the 2004-05 school year.

¶5 The District paid Reissmann's health insurance premiums for the time that she was on leave, and continued to pay them for the rest of the summer. Payment of the summer insurance benefits was consistent with the District's practice of paying such benefits for individuals employed during the previous year, even if those employees were not returning in the fall.

¶6 In September 2004, the District sent Reissmann a letter seeking repayment of $4,321.24 in health insurance premiums which the District had paid on her behalf. At no time before or during Reissmann's leave did the District inform her that, should she not return to work after her family leave, the District would require her to repay the health insurance premiums paid on her behalf during her leave. The District did not escrow money from Reissmann's wages for health insurance premiums in advance of her leave.

¶7 The District filed a small claims action against Reissmann seeking repayment of the insurance premiums. The circuit court issued a bench decision concluding that the Wisconsin FMLA was not controlling and did not bar the District's recovery action. The circuit court also determined that the District was entitled to recovery under the federal FMLA and that federal regulations did not limit the District's recovery rights. A judgment was entered for the District in the amount of $2,107.56. Reissmann appeals the decision and the District cross-appeals with respect to the calculation of the amount due from Reissmann. We reference additional facts as needed in the discussion below.

DISCUSSION

¶8 This case involves the review of a circuit court's statutory interpretation which this court reviews de novo. ***Honthaners Restaurants, Inc. v. LIRC***, 2000 WI App 273, ¶10, 240 Wis. 2d 234, 621 N.W.2d 660.

I. Wisconsin FMLA

¶9 Resolution of this matter involves both the Wisconsin FMLA, WIS. STAT. § 103.10, and the federal FMLA, 29 U.S.C. § 2614(c)(2) (1993).[3] Pursuant to 29 U.S.C. § 2651(b), the provisions of the federal FMLA yield to state law if state law provides greater family or medical leave rights than the rights established under the federal act. We therefore begin with a review of the Wisconsin FMLA.

¶10 WISCONSIN STAT. § 103.10(9)(b) requires an employer to continue an employee's health insurance benefits while the employee is on FMLA leave under the same conditions that applied immediately before the leave began. The statute also provides a mechanism to allow an employer to recover insurance premiums paid if the employee ends employment within thirty days after a period of leave. Pursuant to WIS. STAT. § 103.10(9)(c)1. and 4., an employer may require an employee, in advance of taking leave, to have in escrow with the employer an amount equal to health insurance premiums for an eight-week period. If the employee resigns within thirty days of the completion of the leave, the employer may deduct the amount of the premiums for the leave from the escrowed amount, and return any remaining escrowed amount to the employee. The applicable provisions state as follows:

[3] All references to the United States Code are to the 1993 version unless otherwise noted.

> An employer may require an employee to have in escrow with the employer an amount equal to the entire premium or similar expense for 8 weeks of the employee's group health insurance coverage, if coverage is required under par. (b).
>
> ….
>
> If an employee ends his or her employment with an employer during or within 30 days after a period of family leave or medical leave, the employer may deduct from the amount returned to the employee under subd. 3. any premium or similar expense paid by the employer for the employee's group health insurance coverage while the employee was on family leave or medical leave.

WIS. STAT. § 103.10(9)(c)1. and 4. Reissmann takes the position that this is the exclusive method which the District must utilize to recoup premiums paid. Because she did not resign within thirty days after completing her leave and because the District did not require an advance escrow, she contends, the District has no recourse against her. We disagree.

¶11 In determining whether WIS. STAT. § 103.10(9)(c)1. and 4. are the District's exclusive recovery method, we look to the language of the statute. Statutory language is given its common, ordinary and accepted meaning, except that technical or specially defined words or phrases are given their technical or special definitional meaning. ***State ex rel. Kalal v. Circuit Court for Dane County***, 2004 WI 58, ¶45, 271 Wis. 2d 633, 681 N.W.2d 110. Section 103.10(9)(c)1. states that an employer "may" require an employee to have in escrow an amount equal to premiums paid by the employer during FMLA leave. In addition, § 103.10(9)(c)4. states that an employer "may" deduct from the escrow account any premium paid by the employer while the employee was on FMLA leave if the employee does not return to work. Under the plain meaning of the statutes, both of these phrases are permissive. Nothing in § 103.10 states that

an employer waives its right to collect the debt if it fails to escrow an employee's funds. Moreover, Reissmann cites no authority for the proposition that § 103.10 is an employer's exclusive method of recoupment. We therefore reject Reissmann's argument under the Wisconsin FMLA.

II. Federal FMLA

¶12 Reissmann next argues that even if federal FMLA law applies, it prohibits the District from recouping insurance premiums paid unless the District provided advance notice to her that she may be required to repay the premiums. She contends that the District did not provide her with the requisite notice and that she is therefore relieved of the obligation to repay. We disagree. Under 29 U.S.C. § 2614(c)(2), an employer has the right to recover premiums paid during FMLA leave if the employee fails to return to work.[4] The employer also has a duty to give notice to the employee regarding the FMLA, by "keep[ing] posted, in conspicuous places on the premises of the employer … a notice, to be prepared or approved by the Secretary, setting forth excerpts from, or summaries of, the pertinent provisions of this subchapter and information pertaining to the filing of a charge." *See* 29 U.S.C. § 2619(a). The penalty for a violation by an employer of the posting provision is one hundred dollars. *See* 29 U.S.C. § 2619(b).

¶13 Reissmann does not argue that the District failed to comply with this posting requirement, and the circuit court concluded that the District did comply. Instead, Reissmann contends that the District should be held to a more

[4] 29 U.S.C. § 2614(c)(2) provides that "[t]he employer may recover the premium that the employer paid for maintaining coverage for the employee under such group health plan during any period of unpaid leave … if: (A) the employee fails to return from leave …."

comprehensive notice requirement which was issued as a regulation promulgated by the Secretary of the United States Department of Labor. We disagree.

¶14 The federal FMLA contains a provision directing the Secretary of Labor, within 120 days of the enactment of the FMLA, to "prescribe such regulations as are necessary to carry out" the FMLA. *See* 29 U.S.C. § 2654. Pursuant to this directive, the Secretary issued regulations requiring employers to provide an "employee with written notice detailing the specific expectations and obligations of the employee and explaining any consequences of a failure to meet these obligations." *See* 29 C.F.R. § 825.301(b)(1) (1995).[5] The notice must inform the employee about "potential liability for payment of health insurance premiums paid by the employer during the employee's unpaid FMLA leave if the employee fails to return to work after taking FMLA leave." *See* 29 C.F.R. § 825.301(b)(1)(viii). In addition, the regulation requires the employer to provide the written notice to the employee "within a reasonable time after notice of the need for leave is given by the employee—within one or two business days if feasible." *See* 29 C.F.R. § 825.301(c). Further, if an employer fails to provide notice in accordance with the provisions of the regulation, "the employer may not take action against an employee for failure to comply with any provision required to be set forth in the notice." *See* 29 C.F.R. § 825.301(f).

¶15 The District contends that this more comprehensive and individualized notice requirement is void because it alters the provisions of the FMLA and is similar to other notice provisions promulgated as regulations by the

[5] All references to the Code of Federal Regulations will be to the 1995 version unless otherwise noted.

Secretary of the Department of Labor which have been held invalid. *See, e.g.*, ***Ragsdale v. Wolverine World Wide, Inc.***, 535 U.S. 81, 95 (2002).

¶16 We conclude that the notice provisions of 29 C.F.R. § 825.301 are inconsistent with the notice provisions set out by Congress in the Act itself. Although the Secretary of the Department of Labor has the authority to issue regulations to carry out the duties that Congress has assigned to it in the federal FMLA, it has no authority to change the Act. *See* ***Dormeyer v. Comerica Bank-Illinois***, 223 F.3d 579, 582 (7th Cir. 2000). However, that is what the Secretary has attempted to do. The federal regulation does not address an interpretive issue that the statute leaves open. There is no ambiguity in the statute, nor is there a gap that needs to be filled. Instead, "Congress has directly spoken to the precise question at issue," *see* ***Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.***, 467 U.S. 837, 842-43 (1984), which is the specificity of the notice which employers are required to provide to employees via posting. Pursuant to 29 U.S.C. § 2619(a), the notice was to "set[] forth excerpts from, or summaries of, the pertinent provisions of this subchapter." Instead, the Secretary went beyond the provisions of the Act and crafted entirely new requirements.

¶17 Moreover, the more comprehensive notice provision is contrary to the federal FMLA's remedial design. Under 29 U.S.C. § 2619(b), the penalty for violating the posting requirement is one hundred dollars. In contrast, the penalty imposed by the regulations for violating the more comprehensive notice requirement provides that the employer may not take action against the employee for failure to comply with any provision required to be set out in the notice. *See* 29 C.F.R. § 825.301(f). Although we understand that the Secretary was motivated to further the goals of the Act by providing a detailed process for notifying

employees of the benefits available to them, the Secretary has, in effect, altered the basic terms of the federal FMLA. It is for Congress, not the Secretary, to do so.

¶18 For these reasons, we conclude that the provisions of 29 C.F.R. § 825.301 discussed above which provide a more comprehensive and individualized notice requirement than the notice required in 29 U.S.C. § 2619(a)(1) impermissibly alter the federal FMLA notice provisions. Accordingly, we conclude that the District was entitled to recover the premiums which it paid on Reissmann's behalf during her FMLA leave.[6]

III. The District's Cross-Appeal

¶19 The District argues that the circuit court erred in calculating the reimbursement amount Reissmann owed the District. It contends that since it paid Reissmann's insurance premiums through August 31, 2004, she was unjustly enriched by the circuit court's decision. However, the District has not attempted to set out or apply the elements of an unjust enrichment claim to the facts of this case. Propositions unsupported by legal authority are inadequate, and we will not consider them. ***Winters v. Winters***, 2005 WI App 94, ¶13, 281 Wis. 2d 798, 699 N.W.2d 229.

By the Court.—Judgment modified and, as modified, affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)(4).

[6] The circuit court calculated the District's reimbursement amount to be $40.53 per day for fifty-two days. As we have concluded that the District may only recover for the nineteen days that Reissmann was on unpaid leave, the judgment amount should reflect that the District is entitled to recover $40.53 per day for nineteen unpaid leave days, plus interest at the rate of 5% per year from July 13, 2004, to March 12, 2007 on that amount, and its costs and disbursements as taxed and allowed as calculated by the circuit court.