IN THE MATTER OF THE ARBITRATION

WASHINGTON FEDERATION OF STATE EMPLOYEES

and

AAA 75 390 0072 10
Disability Separation

STATE OF WASHINGTON
HEALTH CARE AUTHORITY

Appearances:

For the Union: Gregory M. Rhodes, Esq.
Younglove & Coker

For the Employer: Karla Larsen, Esq.
Asst. Attorney General

DECISION AND AWARD

The undersigned was selected by the parties through the procedures of the American Arbitration Association. A hearing was held in the above matter on January 24, 2011 in Tumwater, Washington. The parties were given the full opportunity to present testimony and evidence. At the close of the hearing, the parties elected to file briefs. The arbitrator has considered the testimony, exhibits and arguments in reaching his decision.

ISSUE

The parties did not agree on the following issue. The Arbitrator finds the following issue:

> Did the Employer violate the Parties Collective Bargaining Agreement when it separated Grievant from employment? If so, what is the appropriate remedy?

BACKGROUND

The State of Washington, Health Care Authority, hereinafter referred to as the Employer, handles health insurance issues for State employees, retirees and their dependents. One of the Sections of the Employer is known as the Basic Health Program. They provide support for current employees and their dependents. It employs approximately 75 Health Insurance Benefit Specialist 2's (HIBS 2). These are customer service representatives. Another Section of the Authority handles the retirees. It is called the Public Employees Benefit Board (PEBB). It has 11 HIBS'2s. The Washington Federation of State Employees, hereinafter referred to as the Union, represents the full-time employees of the Authority. The current Agreement began on July 1, 2009.

Grievant was employed as a HIBS 2. She began employment in December of 1995. There are several different duties a HIBS 2 must perform. They must review the eligibility of retirees applying for coverage. Many phone calls from retirees are received and it is a Benefit Specialists job to answer any inquiries from retirees or their dependents. There is also a front desk and manning that front desk to handle individuals walking into the office is another aspect of their duties. The Specialists rotate among these different duties during a course of a week.

Grievant was diagnosed with Irritable Bowel Syndrome (IBS) sometime after she began working. This condition did not require her to take any leave without pay or FMLA leave between the years 1995-2000. Beginning in the year 2000 she started to miss more and more work as a result of flare-ups of the

condition. She did not ask for any FMLA Leave between the years 2000-2003. The Employer suggested to her she might be eligible for such leave. The Parties in their Agreement specifically incorporated the FMLA in Article 15. Initially, Grievant was reluctant. She subsequently did apply for it. She went to see Dr. Rogers to determine if she had a disability that qualified under the FMLA. Dr. Rogers examined her and sent a letter to the Employer. In that letter, he noted Grievant had three separate disabilities. In addition to IBS, she had hypothyroidism and suffered from anxiety and depression. He further noted medication generally took care of the hypothyroidism. He observed that the IBS was much more difficult to control and the prognosis was poor. It was "unpredictable" when the symptoms might arise and they could cause "unscheduled absences." He noted stress was a trigger for the flare-ups and many with this disease experience depression. Based on this report, it was determined her conditions qualified for absences under the FMLA. They would be intermittent absences required whenever the symptoms arose.

An employee must have worked 1250 hours in a year to be eligible for FMLA leave. To again be eligible in subsequent years, an employee must work an additional 1250 hours. A rolling year is used. Leave commences the first day an employee who has been deemed to be eligible takes leave because of the employee's disability. The employee is entitled to 480 hours of leave under the FMLA. After the initial leave was used in 2004, Grievant qualified for and again started using FMLA leave. She did so in 2005, 2007 and 2008. During these same periods, she also had to use leave without pay after she exhausted her

FMLA. The Arbitrator has prepared a chart showing the dates Grievant requested FMLA leave and when it was exhausted for each particular year. The chart also shows the number of hours of unpaid leave Grievant utilized during the period covered by the FMLA leave and the number of unpaid hours used before she again qualified for FMLA leave.

Leave History

FMLA Request	Day 1st used	Day exhausted	LWOP
03/30/94	04/26/04	06/2/05	385 Hours
12/08/05 (WC injury)	12/08/05	01/12/06	138 Hours
	01/13/06	02/28/07	745 Hours
02/28/07	02/28/07	07/19/07	8 Hours
	07/20/07	07/08/08	348 Hours
07/08/08	07/08/08	02/27/09	56 Hours
	02/28/09	01/20/10	280 Hours

Grievant had been counseled about her amount of leave without pay. She was given a Letter of Expectations on April 30, 2009. The expectation included a note on the need for regular attendance. She again discussed her attendance with her Supervisor on May 15, 2009. She was initially given a reprimand, which was later changed to a Letter of Counseling on August 25, 2009. The Letter of Expectations was clarified on November 13, 2009 to make clear FMLA time off was excluded from consideration.

Grievant was notified that she provisionally qualified for FMLA Leave on October 21, 2009. The Employer determined given her history that it wanted to obtain second opinions from doctors regarding each of the different disabilities from which Grievant suffered. It made appointments for her to go to Medical Consultant Network. They had physicians in the different disciplines that covered Grievant's disabilities. Dr. Bedard saw her regarding her IBS. He too

noted that anxiety often caused the symptoms to arise. He concurred with the original physician that she will continue to require "intermittent episodes of leave in the range of two days" per episode. The episodes can occur approximately twice a month and an episode could last as long as five days.

Subsequent to the first report in 2004 Grievant had obtained a medical report indicating she also suffered from asthma and needed to occasionally take time off for this illness. As part of its desire to get second opinions it had her get one for this condition, as well. Dr. Mormorstein saw her for the asthma. Grievant told him she might miss 1-2 days per month for this. Dr. Mormorstein believed the condition was under control and this number was high.

Dr. Koolker saw Grievant for her depression and anxiety. He concluded much of her anxiety was work related as she did not seem to get along with her Supervisor. His treatment recommendation was "removal from stressful employment situation."

Article 32 of the Agreement provides in pertinent part:

> 32.5 An employee with permanent status may be separated from service when the agency determines that the employee is unable to perform the essential functions of the employee's position due to a mental, sensory or physical disability, which cannot be reasonably accommodated. Determinations of disability may be made by the agency based on an employee's written requires for disability separation or after obtaining a written statement from a physician or licensed mental health professional. The agency can require an employee to obtain a medical examination, at the agency's expense, from a physician or licensed mental health professional of the agency's choice. Evidence may be requested from the physician or licensed mental health professional regarding the employee's limitations. The Employer will conduct a diligent review and search for possible accommodations with the agency.[1]

[1] It was pursuant to this Section that the Employer had Grievant obtain second opinions.

32.6 The agency may immediately separate an employee when the agency has medical documentation of the employee's disability and has determined that the employee cannot be reasonably accommodated in any available position, or when the employee requests separation due to disability.

The Employer had discussed the possibility of finding a reasonable accommodation when it met with Grievant in 2009. The job description for the position said that "regular attendance" was an essential function of the job. When discussing what could be done, Grievant told them she did not think there was anything the Employer could do at work to accommodate her condition as there was nothing that could be done to prevent the flare-ups that cause the absences, although she did suggest she could work at home. The Employer said this type of accommodation would not work for them.

The Employer following the receipt of the different reports from the Doctors at Medical Consultant Network concluded Grievant could not perform the essential functions of the position and decided to separate her from employment "due to her medical condition." In a letter to her, she was told:

> This action is being taken in accordance with Article 32 of the 2009-2011 Collective Bargaining Agreement…

The separation letter was dated January 20, 2010. As of that date, Grievant had utilized 240 of her 480 hours of FMLA for the current rolling year. The Union grieved the termination. The Union believed both the FMLA and the Collective Bargaining Agreement were violated.

POSITION OF THE EMPLOYER

There is no dispute Grievant is disabled. Medical records made it clear her condition will continue in the future and will continue to cause her to miss work. In the past, she has not only used her FMLA Leave, but also has substantial hours of leave without pay. Given the nature of the services provided, regular attendance is an essential function of the job. Several witnesses testified to that. Grievant is unable to perform this essential function.

The Employer attempted to ascertain if there was any reasonable accommodation that could be made. The accommodation process was explained to Grievant and she never indicated she wanted to participate in the process. Grievant also said she did not believe there was any accommodation that could be made. The Employer looked to see if it could find a different job for Grievant given her disability and was unable to find any such job.

The Employer did not violate the ADA or the FMLA. The Employer was not required to allow Grievant to exhaust all of her eligible hours under the FMLA before taking the action it did. There is interplay between the FMLA and the ADA. Courts have found that when an employee regularly missed work and had to use leave without pay in addition to FMLA leave the employee could be terminated based on an inability to perform the essential elements of the job. The Courts noted the two statutes must be read together and that employers may consider usage of FMLA leave in determining whether an employee can perform the essential elements of a job. The burden placed on the other

employees to handle the work of the absent employee is a valid consideration. This is especially so where the employee's leave will be intermittent and unpredictable. The Employer has cited numerous cases where Courts faced with issues almost identical to the issues facing the Employer here have upheld the right of an employer to terminate a disabled employee for reasons similar to the reasons it was done here.

The Union faults the Employer for allowing her to continue working for so long before it acted. The Employer tried to give Grievant an opportunity to address her medical problems and cannot be faulted for that. It was only when it became clear the situation was not going to get better that the decision was made to disability separate Grievant.

POSITION OF THE UNION

Section 32.2 requires a determination be made that the employee cannot perform the essential functions of the job. That determination must be made by a medical professional. The Employer concluded Grievant could not perform the essential elements of her job because of her attendance. No doctor stated Grievant could not perform the essential functions of the job. None of the medical reports stated with any certainty how much work Grievant would miss. They noted it was impossible to predict. The fact that she needed to miss work in the past does not mean she will need to miss work in the future. She was attempting to find medication to alleviate her symptoms. The Employer has not

met its burden of proof on this first requirement and thus the separation was not proper.

Grievant suffered an ankle injury while at work. She had to take time off for this injury and used her FMLA leave to cover the absence. The Employer in making its decision to separate Grievant considered this absence. This was a single instance that should not have been part of the decision making process.

The Employer is required under Section 32.5 to see if there is a reasonable accommodation that can be made before separating an employee. The Employer asserts Grievant indicated she did not want to explore ways to accommodate her condition. That was not true. She suggested she be allowed to work from home and the Employer rejected the request without exploring why it could not work. Further, even if Grievant did not participate in the process, the Employer is still required under the Section to "conduct a diligent review" of alternatives. It did not offer evidence it did that.

Union exhibits showed that other employees in both this program and the Basic Health Program missed as much or more work than Grievant. The duties of the HIBS employees in both Sections are identical. None of these other employees were disability separated.

Article 15 of the Agreement gives employees all of the rights they have under the FMLA. An employee working 1250 hours is entitled to FMLA leave if the employee has a serious medical condition. Leave can be taken at one time or intermittently. Grievant still had FMLA leave remaining when she was separated. She was entitled to utilize this leave. The Employer violated the

Agreement and the Law when it separated her with this remaining leave. The Employer has confused rights under the FMLA with rights under the ADA. The second opinions sought dealt with possible accommodation and had nothing to do with her rights under the FMLA. The Regulations under the FMLA state that "employers cannot use the taking of FMLA leave as a negative factor in employment actions." The Employer here considered the FMLA time taken by Grievant when it made its decision to separate her. Courts have noted that the rights under the ADA and the FMLA are separate rights and an "employer must afford an employee his or her FMLA rights." The Employer could not separate Grievant from her employment as long as she still had available leave under the FMLA. None of the cases on the subject say it is appropriate to abrogate rights under the FMLA.

DISCUSSION

Grievant has suffered from several disabilities over the years. Starting in 2004, she submitted reports from her physician who diagnosed her various medical problems. Those reports also indicated the conditions were on-going. Each year they did continue and Grievant had to miss additional work because of them. Some of the time missed was covered by the FMLA and some required her to seek leave without pay over and above the FMLA covered time.

The Employer finally decided in 2010 that the absences could not continue. It exercised the provisions of Section 32.5. Separation from employment under this Section is not intended to be disciplinary. Some reference was made

during the course of the hearing to progressive discipline. Progressive discipline is not required under this Section. Grievant was given notice on several occasions in 2009 that her attendance was a problem and needed to improve, but it was not necessary for the Employer under this Article to follow the disciplinary steps or progressive discipline before it took the action it did.

Section 32.5 requires several conditions be met before an employee can be disability separated. One of the conditions is the employee must be permanently disabled. According to the Section, the Agency can determine an employee is disabled "after obtaining a written statement from a physician." The Union in its brief notes the following:

> A medical provider stated, in a letter dated March 31, 2004, that "[g]enerally with ongoing medication and sometimes counseling, people with this common disorder can improve and lead a normal and healthy lifestyle."

It questions the permanence of the disability. It points out that no one can predict the future as to what might happen. This statement from the Doctor it argues bears that out. Certainly, they are correct in that no one has a crystal ball, but past history can be an indication of the future. The note from the Physician referenced by the Union was from 2004. The separation was in 2010. During those six years, the situation did not improve. Furthermore, her physician and Dr. Bedard each concluded in 2009 the episodes would continue at least twice a month and last from 2-5 work days. They did not put an ending date for those episodes. They also found stress from work was a triggering factor. Given the fact nothing had changed over the last almost six years, there is no reason to conclude that the disability was anything but permanent. Based on

these reports and Grievant's history, the Arbitrator finds the Employer has shown Grievant was permanently medically disabled.

The next criterion under Section 32.5 is the disability must prevent the employee from performing the essential functions of the job. One of the arguments raised by the Union is that it is the doctor, not the Employer who determines whether the employee can perform the essential elements of the job. While it was true of the above criterion that the Agency could only make a determination the employee suffers from a disability based on medical reports it is not what this Section says regarding this requirement. The Section involved here says the employee can be separated for a disability "when the agency determines that the employee is unable to perform the essential functions of the employee's position." This determination is made by the Agency, not the physician. The report must provide information that indicates the nature of the disability, but the Agency then looks at the job of the employee to see whether that disability prevents the employee from performing the essential functions of the job.

Several witnesses testified as to the need for an employee to be at work on a regular basis. They noted this is essential given the nature of the duties performed. The PEBB Section is small. There are only 11 HIBS 2's. They must deal with individuals and their health insurance issues. The burden on others as a result of continued unscheduled absences is great. That testimony was not contradicted. The Employer has cited several Federal Court cases that have discussed regular attendance as an essential function of a position. In Waggoner

v. Olin Corporation 169 F. 3d 481, 485 the Court noted: "The fact is that in most cases attendance at the job site is a basic requirement of most jobs." Similarly, in Spangler v. Federal Home Loan 278 F.3d 847 (2001) the Court noted: "This Court has repeatedly held that "regular and reliable attendance is a necessary element of most jobs (citations omitted)."

The Court in Spangler, as well as Courts in several other cases cited by the Employer were specifically asked to decide whether a discharge based on attendance was a violation of the Americans with Disabilities Act. Under the ADA an employee who cannot perform the essential elements of a position can be separated, assuming there is no reasonable accommodation that can be made that would enable the employee to perform those essential elements. Those same requirements have been incorporated into Section 32.5.[2] In Payne v. Fairfax County (USD.C. E.D, Virginia) the Court observed:

> Thus, an employee who cannot meet the attendance requirements of the job cannot perform the essential functions of his job and, therefore cannot be a qualified individual under the Americans with Disabilities Act.

This same conclusion was reached in the other cases cited. The Arbitrator after reviewing these cases and the testimony of the Employer witnesses agrees with the Employer's determination that Grievant was unable to perform the essential functions of the job and that the decision did not run afoul of the ADA.

The third requirement under Section 32.5 is that no reasonable accommodation can be made. The Union argues that the Employer before

[2] The question of accommodation will be addressed shortly. At this juncture of this discussion the issue being examined is whether regular attendance is an essential element.

reaching its decision failed to attempt to accommodate Grievant's condition. The Employer did meet with Grievant in 2009 at the time the counseling was issued. The accommodation process was explained to Grievant. They discussed whether any equipment the Employer might get could aid Grievant. Grievant indicated there was no new equipment that could assist her. It was suggested by her and the Union she be allowed to work at home. This suggestion was rejected by the Employer. Was working at home a reasonable accommodation? In Payne, the employee asked for the ability to work extra shifts to make up the time. The Court noted the Employer had no policy allowing for this and found it was not a reasonable accommodation. The Employer here has stated that this would not work. To work at home, the Employer would have to put its phone number on Grievant's phone so she could answer calls. Even if that could be done, answering calls is only one aspect of the job. She needs to do paperwork and more importantly, sit at the front desk in the lobby. She cannot do that from home. That means the other ten employees would have to pick up this portion of her duties and, consequently, give them less time for their other duties. This puts a greater burden on them. The Arbitrator cannot find a basis for rejecting the Employer's reasoning on this point. Section 32.5 allows the Employer to separate the employee if the disability "cannot be reasonably accommodated." There is no evidence that would warrant overturning the Employer's determination that there was no reasonable accommodation for Grievant's disabilities and no other positions available would work for her given her absences. To the contrary, the evidence would support that finding.

The Arbitrator recognizes he is not bound by any of the Court cases cited above. However, their reasoning cannot be faulted. More importantly, the evidence here supports the Employer's conclusion Grievant met all the conditions set forth in Section 32.5 for a disability separation. If that was the only Section under consideration this matter would be concluded. There is a significant wrinkle, however, that prevents this discussion from ending here. Grievant applied for and received leave under the FMLA. Many of her absences were covered by that Act. Under this Act it is improper for an Employer to consider FMLA time off when making employment decisions. 29 C.F.R. 825.220(c) specifically states: "employers cannot use the taking of FMLA leave as a negative factor in employment actions." The Union argues the Employer violated this Act and its regulations when it considered all time off, including time off covered by the FMLA when it separated Grievant. The Parties in Article 15 incorporated the FMLA into their Agreement. The Article is entitled Family and Medical Leave-Pregnancy Leave. The Section incorporates many of the same requirements that are listed in the act, such as the hours of work needed to qualify. Therefore, the Arbitrator cannot end the discussion with a finding that the requirements of Section 32.5 have been met, but must also address the interplay between the FMLA via Article 15 and the ADA, as incorporated into Section 32.5.

The Employer discussed extensively this interplay in its briefs. It cited several cases where Courts had to determine whether the discharge of a disabled employee who missed extensive work, some of which was covered by the FMLA was appropriate. These Courts discussed the FMLA and the ADA and how they

are to be read together. It is worth repeating here what some of those Courts concluded. The Court in Payne discussed the legislative history of the two acts and the Regulations promulgated after the passage of each Act. It first observed:

> Although not explicitly stated in the Act, the statute clearly manifests a general intent by Congress that such FMLA leave should not be "held against" the employee. Therefore, this Court arrives at the judicial intersection of two statutes that are often implicated by similar circumstances: the FMLA and the ADA. In turn, the following issue is presented for this Court to decide: whether an employee's leave taken pursuant to the Federal and Medical Leave Act may be held against the employee in determining whether Plaintiff can perform the "essential function" of attending a job within the meaning of the American with Disabilities Act. This Court holds that it may.

The Court when reaching this conclusion discussed 29 C.F.R. 825.702 which was drafted to specifically deal with this issue. That regulation states:

> Nothing in the FMLA modifies or affects any Federal or State Law prohibiting discrimination on the basis of disability. FMLA legislative history explains that FMLA is 'not intended to nullify or affect the Americans with Disabilities Act of 1990, or any the Regulations issued under the Act.

The Court found "this Regulation is directly on point."

In Carmona v. Southwest Airlines Co., 604 F.3d 848, 860 (5th Cir. 2010), the Court noted:

> Employees generally become entitled to FMLA leave when they are no longer able to perform the essential functions of their jobs. *See* [29 U.S.C.] at § 2612(a)(1). However, an employee is not entitled to intermittent leave if he cannot perform the essential functions of his job when his is present... Because the FMLA is designed to excuse employees from work, an awkward situation arises, legally speaking, when an employee seeks intermittent leave from a job where attendance is essential. On the one hand, the FMLA is designed to excuse attendance requirements. On the other hand, if the employee cannot attend a job where his attendance is vital, he cannot perform one of the essential functions of his job, and a heavy burden is placed on his employer if it must grant him intermittent leave.

> This tension led Congress to soften FMLA's impact where employees seek intermittent leave. The language of the statute and the regulations promulgated by the Secretary of Labor provide that an employer may transfer an employee who seeks intermittent leave from a job where attendance is vital to an equivalent position where the employee's periodic absences will be less burdensome. 29 U.S.C.A. § 2612(b)(2); 29 C.F.R. § 825.204 (1997). This tension has also caused courts to interpret the FMLA narrowly where an employee requests the ability to take intermittent leave without notice. The Seventh and Eight Circuits have stated that "the FMLA does not provide an employee . . . with a right to 'unscheduled and unpredictable, but cumulatively substantial, absences' or a right to 'take unscheduled leave at a moment's notice for the rest of her career.'" [Citations omitted]. At least one district court in this circuit has also applied this rule. *Henson v. Bell Helicopter Textron, Inc.*, No. Civ.A.4:01-CV-1024-Y, 2004 WL 238063, at *11 (N.D. Tex. Feb. 6, 2004).
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> Therefore, while the FMLA can excuse an employee from his employer's ordinary attendance requirements, it does not do so where the employee requests the right to take intermittent leave without notice indefinitely.[3]

There are other cases cited that reach a similar conclusion.[4] It is clear from these cases that an Employer may consider all time missed when evaluating whether an employee can perform the essential functions of a position. In all the cases cited the employee did not just miss time covered by the FMLA, but also had a considerable amount of unpaid leave. That is the exact situation here. Grievant exhausted her FMLA leave on February 27, 2009 and had an additional 336 hours of unpaid leave until she qualified again for FMLA leave. She had 348 hours of unpaid leave during 2007-08 and 745 of unpaid leave the years before that. All of this time was after and in addition to unpaid leave

[3] The Court in its decision quoted from Sprangler. The Court in Sprangler contrasted the rights granted to employees under the ADA with the rights granted employees under the FMLA. It noted the purposes for the creation of the two acts were distinctly different.
[4] See also Waggoner, supra; Praigrod v. St. Mary's Medical Center 2007 WI. 178627 (S.D. Ind, 2007) which cited both Sprangler and Payne.

during the periods covered by the FMLA. Combined with paid time missed, this is a considerable amount of time to miss work. The Arbitrator finds after considering all of the above that it was not erroneous or in violation of the FMLA for the Employer to consider all of this missed time when it reached its decision to separate Grievant from her position, especially since the time missed and that will be missed in the future is so intermittent .

The Union has raised another argument which also must be addressed. It points out that the Employer allowed Grievant to work for years without taking the step it took. Why now it asks? Should the delay be held against the Employer? The Court in Waggoner addressed this issue. It observed at p. 484:

> But the fact that Lucent Technologies had infinite patience does not necessarily mean that every company must put up with employees who do not come to work.

The Union had noted as discussed earlier back in 2004 the doctors were hopeful. The Employer waited to see if the situation would stabilize and attendance improve. It gave her time for this to occur. Unfortunately, it did not. The Arbitrator does not find this delay somehow precluded the Employer from taking the action when it did, especially after receiving the 2009 medical reports.[5]

Alas, this is still not the end of the matter. There is one more significant issue to address. The Union points out Grievant still had 240 hours of FMLA leave available when she was separated. She had been provisionally approved

[5] The Union as part of this same argument offered a list of employees who it claims used as much or more time than Grievant. It argues there was disparate treatment. This argument is rejected for two reasons. Disparate treatment is commonly raised as a defense in discipline cases. As noted this is not a disciplinary action. Secondly, while there were some employees who used more hours in a single year, few had a prolonged history over many years like Grievant and there was no showing any had a prognosis like that of Grievant.

for that leave. She was sent to get a second opinion. Something the Employer unquestionably had a right to seek. While the second opinion confirmed the IBS continued to be a problem and there was no immediate expectation it would end, it also reconfirmed there was a "serious medical condition that requires the employee's absence from work." There was nothing in the report, nor does the Employer argue, Grievant did not continue to meet the requirements for FMLA leave. The Union then points out that in all of the relevant cases the employee had exhausted the FMLA leave available at the time of the separation. Of particular note is the Spangler case. The Court in Spranger said:

> If Sprangler had a serious health condition which made her unable to perform her job and if she made a valid request for FMLA leave, *upon the expiration of her leave* the Bank would be under no obligation to reinstate her if she remained unable to perform the essential functions of her job (emphasis added).

Balancing that statement, it observed at the end of its opinion:

> Finally, we emphasize, as the Seventh Circuit did in Collins, the FMLA does not provide an employee… with a right to 'unscheduled and unpredictable, but cumulatively substantial absences' or a right to 'take unscheduled leave at a moment's notice for the rest of her career. Collins 272 F.2d at 3007. On the contrary, such a situation 'implies that she is not qualified for a position where reliable attendance is a bona fide requirement.'

There is absolutely no question had the Employer here waited until the expiration of the FMLA and separated Grievant if she then had further absences it would have been fully within its rights to do so. What complicates the issue is that she had made a valid request for FMLA leave and she qualified for it. She met the test in Spranger. Conversely, she had cumulatively

substantial intermittent absences and the evidence suggests there is no end in sight, the other caveat in Spranger.

Taking all of this together and especially giving consideration to the intent of the Parties by the inclusion of the FMLA into the Contract in Article 15, the Arbitrator must conclude the Employer acted precipitously. While Article 32 and the ADA allow an employer to consider all time missed, including FMLA covered time when determining whether an employee has regular attendance, Article 15 and the FMLA grant independent rights which require the Employer to wait to make that determination until the current allotment of FMLA leave has been exhausted. That is how both statements in Spranger, both laws and both Contract Articles can best be reconciled.

The Union argues the remedy for that is reinstatement and backpay. The Arbitrator does not agree. As noted in Spanger, the FMLA does make an otherwise unqualified employee based on attendance issues qualified. To put her back in that job so that she can utilize her 240 hours of FMLA before again being separated for going over that limit is unfair to the Employer and the other employees in the Section. As was stated earlier, while no one can see the future with any certainty, history does tend to repeat itself and that is the best judge there is. That was the conclusion of her doctor and the specialists and their opinions must be given weight.

Is there then any remedy for this violation? The Arbitrator could award Grievant the 240 hours to which she was entitled, but would any of that missed time have been paid hours? It is unknown if Grievant had any leave

remaining at the time she was separated and if she did whether she was paid for that time upon her severance. If she had any paid leave time remaining which was not paid, she is entitled to be paid for that time. Further, Grievant was found eligible for FMLA leave on October 21, 2009. Between that date and her termination she used ½ of her FMLA leave. Using that as a guide, she might have worked three more months before she exhausted her FMLA leave. During those three months, she would have accumulated leave. She should be paid for the leave she did not earn, but would have earned but for the premature separation. She should also be paid for any holidays that fell between January 20 and April 20. Further, should this issue arise in the future the Employer is directed to wait until the expiration of any unused FMLA leave before exercising its rights under Article 35.

One final matter needs to be addressed. Grievant on the way to one of the doctor appointments arranged by the Employer suffered a broken windshield. She has asked she be reimbursed for the cost of replacing the broken windshield. The cost was $1331. Was a broken windshield a foreseeable event when scheduling the appointment? The Arbitrator thinks it is not. If the Doctor had done something wrong, there might reasonably be a causal connection between the loss and the appointment. That is not the case. A vehicle, presumably a truck, damaged the windshield and there is no way that this was foreseeable. It did not occur on the Employer's premises or the premises of the Doctor. Absent some reasonable causal connection, the Arbitrator cannot hold the Employer liable for this damage.

AWARD

1. The grievance is denied in part and granted in part.

2. The Employer did not violate Article 32 when it disability separated Grievant from Employment.

3. The Employer violated Article 15 when it separated Grievant while she had FMLA Leave remaining.

4. The Employer is precluded in the future from disability separating an employee who has qualified for and unused FMLA leave.

5. Grievant will not be reinstated. If Grievant had any leave accumulated at the time of her separation which was not subsequently paid to her upon her separation, she should be paid for that leave. In addition, any leave she would have accumulated for three months from January 20 will be credited to her and paid to her up to a maximum of 240 hours. She should also be paid for any holidays that feel within that period.

Dated: April 21, 2011

Fredric R. Dichter,
Arbitrator

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