

**SERIOUS HEALTH CONDITIONS? SERIOUS PROBLEMS FOR
EMPLOYERS: INCONSISTENCY IN THE INTERPRETATION
OF THE FAMILY AND MEDICAL LEAVE ACT BY THE COURTS**

By:

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I. INDIVIDUAL LIABILITY OF HUMAN RESOURCE PROFESSIONALS

One of the aspects of the FMLA that is becoming abundantly clear is that HR professionals can be personally liable if they make decisions violating the FMLA. See Mercer v. Borden, 11 F. Supp.2d 1190 (C.D. Calif. 1998); Meara v. Bennett, 27 F. Supp.2d 288 (D. Mass. 1998); Rupnow v. TRC, Inc., 999 F.Supp. 1047 (N.D. Ohio 1998); Stubl v. T.A. Systems, 984 F.Supp. 1075 (E.D. Mich. 1997); Beyer v. Elkay Manufacturing, 1997 WL 587487 (N.D. Ill. 1997); Holt v. Welch Allyn, 3 WH Cas. 2d 1622 (N.D. N.Y. 1997). This is contrary to Title VII, The Americans with Disabilities Act, and the ADEA that do not provide for individual liability. Thus, when an HR professional makes a decision on an FMLA claim, he is putting his personal assets on the line against any damages he may cause if he makes a mistake. Moreover, the employer has no duty to defend or indemnify the employee for any judgment that might be rendered against him.

Frankly, this does not make any sense. The FMLA provides employees substantive rights. Those rights are given by the employer, not the HR professional in charge. The HR professional does not pay the health insurance premiums for employees while they are on leave. Because the Act requires an employer to provide something, rather than refrain from doing an act, it is more susceptible to mistakes. That is, it is easier to refrain from discriminating than to determine whether an employee is entitled to leave and how much. An HR professional should not be required to put his personal assets on the line when he is making decisions for the benefit of the employer and a co-employee.

One of the main problems is courts have yet to recognize a distinction in the private sector between an employee doing his job and an employee doing a personal act. This distinction does exist in the public sector where employees are acting either in their "official" capacity or "personal" capacity, but rarely both. Because of this distinction, the Eleventh Circuit Court of Appeals held that a public employee could not be sued in his personal capacity for mistakes he had made in administering the FMLA leave of another public employee. Wascura v. Carver, 1999 WL 123644 (11th Cir. 1999). Nevertheless, private sector employees who administer the FMLA are subjected to personal liability for their mistakes.

In the end, if Congress is going to limit the applicability of the FMLA to employers with a minimum number of employees, it should not subject individuals with very limited resources to liability for violations of that law.

II. SERIOUS HEALTH CONDITION

No one disputes that the FMLA's coverage of "serious health conditions" was not intended to cover the common cold and other minor conditions for which treatment and recovery periods were brief. Nevertheless, the definition of "serious health condition" under the FMLA regulations is a lesson in complexity. The Department of Labor, Wage and Hour Division, that wrote the definition, had trouble figuring it out. It initially issued an opinion letter stating that if minor conditions such as colds met the technical requirements of the definition of serious health conditions, they were not qualifying conditions. DOL FMLA Opinion No. 57, April 7, 1995. The DOL later rescinded its opinion and concluded that the nature of the underlying condition does not matter if the employee meets the technical requirements of the regulations. See DOL FMLA Opinion No. 86, December 12, 1996. In spite of this, the regulations provide examples of conditions that do not meet the definition of serious health condition based upon the nature of the condition including, colds, the flu, earaches, upset stomachs, headaches, other than migraine, minor ulcers and routine dental problems.

One of the requirements for a condition to be a "serious health condition" is that the employee receive continuing treatment from a doctor for the condition. Nevertheless, courts are split on what constitutes continuing treatment. The regulations state that a course of prescription medication can constitute "continuing treatment." § 825.114(b). This statement has not been accepted by all courts. In Beal v. Rubbermaid Commercial Products, 972 F.Supp. 1216 (S.D. Iowa 1997), the plaintiff was terminated for failure to comply with her employer's attendance policy. The employee claimed an absence caused by bronchitis should have been exempted as FMLA leave. The court disagreed noting the plaintiff saw the doctor only once for the condition. Moreover, the court held that the plaintiff's taking prescription medication for the condition was not "continuing treatment."

Contra, in Brannon v. Oshkosh B'Gosh, 897 F.Supp. 1028 (M.D. Tenn. 1995), the plaintiff's daughter's had pharyngitis and an upper respiratory infection with a fever lasting several days. The daughter saw a doctor at the hospital on an outpatient basis, was prescribed a course of prescription antibiotics and was advised by the doctor to stay home for as long as the fever remained. This was for a period of more than three calendar days. The court concluded that the one visit to the doctor and a prescription for antibiotics satisfied the requirement of a continuing course of treatment.

With conflicting decisions like these, it is very difficult for HR professionals to ascertain whether an illness constitutes a serious health condition.

III. NOTICE: HOW MUCH INFORMATION IS NECESSARY

As the Fifth Circuit has noted, "Significantly, the [FMLA] does not specify the form of notice required for foreseeable leave, nor does it mention any notice requirement for

unforeseeable leave.” Manuel v. Westlake Polymers Corp., 66 F.3d 758, 761 (5th Cir. 1995). Thus, what an employee needing leave for an unforeseeable circumstance must do to be protected by the FMLA is purely a creature of the DOL regulations. The regulations provide that the employee must provide notice of the leave request as soon as practicable. Notice should normally be provided within one to two working days of the employee's learning of the need for leave. § 825.302(a)(b). The employee can provide this notice in person, by telephone, facsimile, or by a personal representative if the employee is physically unable to provide notice. § 825.303(b).

The regulations state and the cases have held that an employee need not actually invoke the term FMLA to be entitled to its protection under the Act. Manuel v. Westlake Polymers Corp., 66 F.3d 758 (5th Cir. 1995). See also, Price v. City of Forth Wayne, 117 F.3d 1022 (7th Cir. 1997) (employee filling out employer provided leave request form and attaching note from doctor requiring her to take time off sufficient to put employer on notice). Instead, the employee must “state a qualifying reason for the needed leave.” § 825.208. This is the opposite of a bright line test. As the Fifth Circuit stated in Westlake:

We decline to announce any categorical rules for the content of the notice by an employee. When an employee cannot give 30-days advance notice of the need for FMLA leave, the FMLA requires notice “as is practicable.” 29 U.S.C. Sec. 2612(e) (2) (B). What is practicable, both in terms of the timing of the notice and its content, will depend upon the facts and circumstances of each individual case. The critical question is whether the information imparted to the employer is sufficient to reasonably apprise it of the employee's request to take time off for a serious health condition.

Manuel v. Westlake Polymers Corp., 66 F.3d 758, 764 (5th Cir. 1995).

Some courts have held the provision of very little information satisfies the employee's notice obligations. For example, a district court in California held statements that the employee was “sick” combined with subsequently submitted doctor's notes to satisfy the notice requirement.

Here, Sims notified AC Transit of his need for leave “as soon as practicable” and submitted his medical notices to AC Transit within the outer limit of two days after his return to work. It is undisputed that Sims called into work on April 18, 1994 and told the dispatcher that he “needed to be put on the sick book.” AC Transit concedes that during Sims' absence, Sims went into the bus yard on at least three occasions and signed the “sick book.” AC Transit also concedes that Sims submitted the three doctor's slips within two days of his return to work. This was sufficient information to put AC Transit on notice that Sims' absence was due to a potentially FMLA-qualifying reason, and thus triggered

AC Transit's duty to inquire further into whether the leave qualified for FMLA protection.

Sims v. Alameda-Contra Costa Transit Dist., 2 F.Supp.2d 1253 (N.D. Cal. 1998).

Likewise, in Brannon v. Oshkosh B'Gosh, Inc., 897 F.Supp 1028 (M.D. Tenn. 1995), the employee called the employer and said she was staying home to take care of her "sick" daughter. The court held this statement was sufficient to put the employer on notice of the potentially FMLA qualifying nature of the leave. If the employer desired more information, it was up to the employer to ask for it. The employer made no inquiries. Therefore, the employer's assessment of points against the employee for these absences and her subsequent termination because of them violated the FMLA.

But in McGraw v. Sears, Roebuck & Co., 1998 WL 650896 (D. Minn. 1998), the court held, "[A] mere declaration that an employee is going to counseling, or that a family member is ill, is insufficient to comply with FMLA's notice requirement. While an employer's duty to inquire may be predicated on statements made by the employee, the employer is not required to be clairvoyant."

The nebulous notice standards have resulted in directly conflicting decisions. In Reich v. Midwest Plastic Engineering, Inc., 2 WH Cas.2d 1409 (W.D. Mich. 1995) the employee told her employer that she had chicken pox when she missed a week of work. However, she did not tell the employer she had been hospitalized for chicken pox, nor that she was under the continuing care of a health care provider for chicken pox. The court held these communications did not provide the employer with the information about her condition necessary to entitle her to FMLA leave. It reasoned because of these omissions, the plaintiff "failed to communicate sufficient information to inform Midwest that her leave was as the result of a 'serious health condition' and was, therefore, protected as FMLA qualifying leave." Merely notifying the employer of a medical condition without advising it of any of the other requisites entitling an employee to leave was not enough. See also Johnson v. Primerica, 3 WH Cas.2d 109 (S.D.N.Y. 1996) (employee's intimating to his employer his son was ill was insufficient notice to entitle him to FMLA leave).

But in George v. Associated Stationers, 932 F.Supp. 1012 (N.D. Ohio 1996), the court reviewed the termination of another employee who missed work on account of chicken pox. The employee, prior to seeing a doctor, called his supervisor and told him he could not work because he had chicken pox. The employee was terminated, without further inquiry by his employer, because this absence put him past the limit of the employer's no fault attendance policy. The court held the termination was unlawful. In discussing the notice given by the employee, it held:

George contacted his supervisor the morning of January 3, thus supplying the required verbal notification that he needed the qualifying leave. He was not required to assert rights under the Act. 29 C.F.R. § 825.303(b); Hendry v. GTE North, Inc., 896 F.Supp. 816, 828 (N.D. Ind. 1995). The obligation shifted to the employer to determine whether leave was sought under the Act and to obtain any additional information. *Id.* If the Company required medical

certification in conjunction with a leave request, it was required to give notice of its demand to George. 29 C.F.R. § 825.305.

Id. at 1016.

Following the decisions of the court's requiring very little information would turn every absence an employee has into a situation requiring FMLA analysis. It was certainly not the intent of the act to turn ordinary sick leave into a administrative quagmire.

IV. CONCLUSION

These are but a few of the difficulties presented in administering the FMLA. But difficulty in ascertaining whether an employee might need FMLA leave and whether an employee is qualified for FMLA leave present a significant hurdle in administering the dictates. When these problems are combined with the specter of personal liability for mistakes, the prospect of being responsible for FMLA leave becomes frightening.