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THE EAGLE'S VIEW

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Supreme Court Rules for Employer in FMLA Case

Employers have long been confused about an FMLA regulation that provides that it is the employer's responsibility to designate leave as FMLA-qualified, and to give notice of the designation to the employee. The regulation further states that an employee will retain the right to twelve weeks of FMLA leave if the employer fails to provide prior notice that the leave will be counted as FMLA leave. 29 C.F.R. § 825.208(a), 825.700(a). The U.S. Supreme Court has struck down this Labor Department regulation as unreasonable and invalid, thus significantly relieving employers of some of the administrative burdens of FMLA. *Ragsdale v. Wolverine World Wide, Inc.*, ____ U.S. ___ (March 19, 2002).

Under the facts of the case, the employer had granted the plaintiff thirty weeks of leave when cancer kept her out of work, a more generous policy than that required by the FMLA. The employer failed to notify her, however, that twelve weeks of absence would count as her FMLA leave. After the plaintiff sought another extension of her leave, the employer advised her that she had exhausted her leave under the company plan, and she was terminated when she did not come back to work. She sued under the FMLA, contending that when she was denied additional leave and terminated after thirty weeks, the FMLA guaranteed her twelve more weeks of leave because the employer was in technical violation of the Labor Department regulation requiring it to inform her she was on FMLA leave.

The employer contended that it had complied with the statute by giving her thirty weeks of leave, more than twice what the Act required. The U. S. Supreme Court finds that the regulation in question punishes an employer's failure to provide timely notice of the FMLA designation by denying it any credit for any leave granted before the notice, and thus is unconnected to any prejudice the employee might have suffered from the employer's lapse. The Court finds this categorical penalty incompatible with the FMLA's comprehensive remedial mechanism, inconsistent with Congress' intent, and thus unenforceable.

Editor's Note - *Although this 5-4 decision by the U. S. Supreme Court is a strong victory for employers, employers should nevertheless attempt to comply with the FMLA regulations as much as possible, including those requiring the notice to the employee of the FMLA leave designation. The regulations require not only written notice of the designation of FMLA leave, but also require the employer to provide detailed information concerning the employee's rights and responsibilities under the Act within a reasonable time after notice of the need for leave is given by the employee - within one or two business days if feasible. This procedure will simply allow for more orderly administration of the law and make it less likely for a court or investigator to feel sorry for an employee who was not informed of his or her rights or responsibilities. However, one practical application of the ruling is that if the employer fails to give the written notice in a timely manner, it can give the notice and still allow the FMLA leave to be counted retroactively back to the date of the beginning of the leave.*

Inside.....

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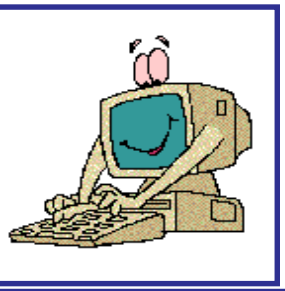
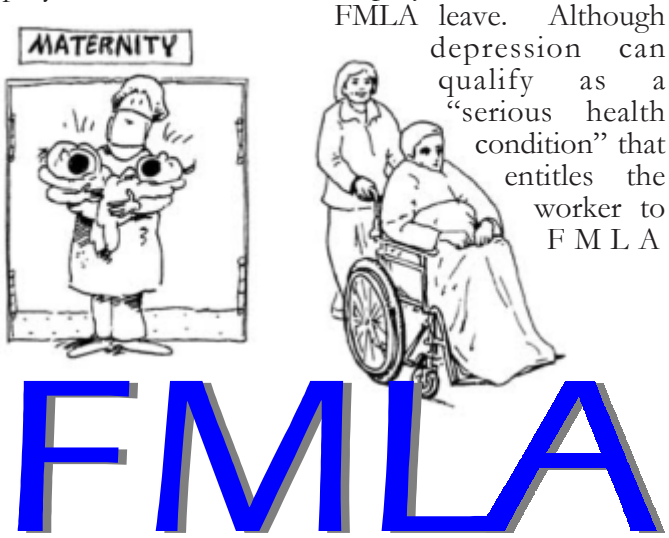
Our web site includes comprehensive information about our lawyers and practice areas as well as upcoming seminars, conferences, publications available from our firm, and information about the latest labor and employment law developments on the newsletter page. Check it out today!



Other FMLA Cases Also Rule for Employers

Another fact pattern that has plagued employers in litigation has been an employee who goes out on FMLA leave, but then he fails to follow appropriate company policies for returning from such leave and/or notification to the employer of his absence. In one such recent case, an employee had been hospitalized after an asthma attack, but then failed to call in or show up for work for three consecutive work days. She was properly terminated for violating her employer's attendance policy, ruled the Seventh Circuit Court of Appeals in *Lewis v. Holsum of Fort Wayne, Inc.* 278 F.3d 706 (C.A. 7, 2002).

Although the employee's doctor wrote her an off-work slip stating that she was in the hospital, he did not indicate when she could return to work. The employee's husband delivered the slip to the plant manager and the employer designated the time that the employee was in the hospital as FMLA leave. The following week, the employee and her husband took previously scheduled vacation time. However, when the designated vacation ended, the employee failed to show up for work. She also failed to call her employer and notify it of the need for leave. After three days, she was terminated for violating the employer's attendance policy. On the day she was terminated, the employee went back to her doctor and received another off-work slip, indicating that she could return to work in a week. Finding that the employee was properly terminated in accordance with company policy, the court noted that the FMLA does not "authorize employees on leave to keep their employers in the dark about when they will return."



In still another case, the same Seventh Circuit Court of Appeals addressed a situation in which an employee took leave during a bout with depression, telling her employer only that she was "sick." She had previously received twelve informal and four formal warnings about deficient attendance, and she was fired on this last occasion when she called in sick for two days. She did not specify the nature of the illness, but merely reported that she was "sick."

In her lawsuit, she alleged that her firing violated the FMLA, and argued that depression is a type of serious medical condition covered by the Act. Questioning whether the woman was covered by the FMLA, the court said that even if she were, she did not comply with the Act's notice provisions, which require employees to tell employers of their need for FMLA leave. Although depression can qualify as a "serious health condition" that entitles the worker to FMLA leave, she notified her employer that she was "sick," not "depressed," the court pointed out. Therefore, the employer had no way of knowing that she was experiencing a medical condition that might trigger her rights under the FMLA. Employers "are entitled to the sort of notice that will inform them not only that the FMLA may apply but also when a given employee will return to work," the court said, in affirming a summary judgment ruling for the employer. *Collins v. NTN Bower Corp.,* 272 F.3d 1006 (C.A. 7, 2001).

Editor's Note *- Although the above two Seventh Circuit rulings are in favor of the employer, the two cases both involve fact patterns that continue to create litigation. For example, in another recent ruling, an employee called her employer and left a message that she would not be in because of "depression again," thus creating a jury issue as to whether she gave sufficient notice that she would need FMLA leave. Spangler v. Federal Home Loan Bank of Des Moines, 278 F.3d 847 (C.A. 8, 2002). In this particular case, the appeals court noted that an employee does not have to invoke the FMLA by name in order to put the employer on notice that the employee's absence may qualify as FMLA leave, and that the employer knew the employee suffered from depression, knew she needed help in the past for that condition, and knew she was suffering from depression again when she called in sick just before she was terminated. Under the circumstances, even though the employer had a strong argument that the employee's notice was untimely, unclear, inappropriate or in violation of the employer's reasonable notice policies, for purposes of presenting the case to the jury, the employee's notice was sufficient.*

Addition of Immigration and Nationality Law

Anita Patel has joined Wimberly Lawson Seale Wright and Daves as of counsel, and practices in the areas of Immigration and Nationality law with a particular emphasis on Business Immigration. She can be reached at the Knoxville office , telephone 865-546-1000.

What Does a Plaintiff Have to Say In a Lawsuit to Get to Court?

The U.S. Supreme Court has now answered a question many employers have wondered: What does a plaintiff have to say in a lawsuit to get to court? *Swierkiewicz v. Sorema, N.A.*, 88 F.E.P. Cases 1 (February 26, 2002). The lower court had dismissed the lawsuit shortly after it was filed, because the plaintiff in the employment discrimination complaint failed to allege facts constituting a *prima facia* case of discrimination. The lower court held that the plaintiff had failed to meet his burden because his allegations were insufficient as a matter of law to raise an inference of discrimination, because the lawsuit did not allege certain elements it deemed necessary: (1) membership in a protected group; (2) qualification for the job in question; (3) an adverse employment action; and (4) circumstances that support an inference of discrimination.

The Supreme Court ruled that to get in the courtroom door, employment discrimination plaintiffs need only state in their lawsuit a "short and plain statement of the claim showing that the pleader is entitled to relief." The Court says this simplified pleading standard applies to most civil actions, with the exception of lawsuits based on fraud or mistake. The worker's complaint thus met this standard, as the complaint detailed the events leading to his termination, provided relevant dates, and included the ages and nationalities of at least some of the people involved in his termination. "These allegations gave the respondent fair notice of what the petitioner's claims are and the grounds upon which they rest," the Court said.

Editor's Note - *In so ruling, the Supreme Court rejected the employer's argument that allowing lawsuits based on conclusory allegations of discrimination to go forward will burden the courts and encourage disgruntled employees to bring unsubstantiated suits. The Court did note that if a pleading fails to specify the allegations in a manner that provides sufficient notice, a defendant employer could move for a more definite statement before responding. The Court also noted that where a lawsuit clearly lacks merit, an employer may after a period of time for Court discovery move for a summary judgment contending that the case is so weak that it should be dismissed as a matter of law without a trial. While this case really does not have much significance in a legal sense, it does say loud and clear that a plaintiff does not have to say much in a lawsuit to get in court, or at least start the process.*

-- PERSPECTIVE -- Employee Use of Cell Phones Raises Legal Issues

Certain interesting legal questions are raised by off-duty use by employees of cell phones for work purposes. One issue is whether such use constitutes compensable work time for non-exempt employees. In general, a brief and isolated phone call to an off-duty employee on their cell phone might be deemed *de minimus* and therefore not compensable. However, lengthy or repeated calls would probably be deemed to be compensable time under the Wage-Hour laws. Indeed, particularly complicated situations arise when the off-duty employees are on-call, required to be available by telephone, and to report to work on short notice. The critical legal issue of whether all such "on-call time" is compensable, depends on whether the employees can use the on-call time effectively for their own purposes. The factors the courts generally examine are the required response time, geographical restrictions, consequences of failure to respond, relief from on-call status, duties required while on-call, activities in which the employee may or may not participate, the agreement between the employer and the employee, and the method by which the employee is contacted. In general, if an off-duty employee is only obligated to tell his employer where he could be reached in case of an emergency, and is given a reasonable amount

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JERRY PINN

Jerry is a senior associate and practices out of the Knoxville, Tennessee office. He received his Bachelor of Arts degree in Government and History from Cornell University in 1987, cum laude, and was admitted to the Phi Beta Kappa honorary society. Jerry served as Editor in Chief of the Cornell Review and he was the recipient of the Dunaway Award for being the best graduate in the Government/Political Science Department. He received his Doctor of Jurisprudence degree from the University of Michigan Law School in 1990. He joined the firm after practicing law for five years in Washington, D.C. at a major mid-Atlantic law firm. His emphasis was on commercial and employment law litigation. Currently, his primary areas of practice include employment law litigation, wage-hour and employment practices compliance.

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of time to report to work in the case of an emergency, the time on call is generally not considered compensable.

Another legal issue of some importance is what happens if the employee has some type of accident while off duty but using the cell phone for business purposes. This question is more than theoretical since there are some studies indicating that people cannot drive an automobile in a normal fashion while talking on a cell phone. While generally an employer is not liable for an employee's actions off duty and not on company business, a different result can occur if the employee is acting in the scope of his or her employment at the time the accident occurred. Several lawsuits have resulted in verdicts against employers where their employees were talking on a cell phone conducting company business at the moment of an accident. The bottom line in these lawsuits is that if an employee sustains an accident while making a business-related call, the courts may find the employer liable.

Because of this potential vicarious liability, many employers have instituted a policy prohibiting the use of cell phones for business reasons while driving. Other employers, realizing that it is difficult to enforce such a prohibition on cell phone usage, have instead established guidelines for safe cell phone usage.

MARK YOUR CALENDAR for the 23rd Annual Labor Relations & Employment Law Update Conference. November 14-15, 2002 at the Sheraton Music City, Nashville, TN