Employment Law Briefing

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Assuming the worst

Termination may not preempt FMLA obligations

In *Clinkscale v. St. Therese of New Hope*, the plaintiff claimed that her employer had interfered with her rights under the Family and Medical Leave Act (FMLA) when it terminated her after she'd left work because of an anxiety attack. A district court granted summary judgment for the defendant company, but the U.S. Court of Appeals for the Eighth Circuit took a different view.

Instructions received

The plaintiff worked at St. Therese of New Hope as a nurse in the rehabilitation unit from 2005 through 2010. Despite not being trained for any other unit, she was transferred to the long-term care unit on Oct. 11, 2010. When the plaintiff expressed reservations about her lack of training in long-term care, her supervisors replied that she had "no choice" and must either take the position or lose her job.

During a subsequent conversation with New Hope's Director of Human Resources, the plaintiff had a severe panic attack. The HR Director told her to go home for the rest of the day. The next morning, the plaintiff received a doctor's note instructing her to take the rest of the week off, which she personally delivered to New Hope. In return, its HR department provided her with FMLA forms. Later that day, however, a member of New Hope's HR staff called the plaintiff at home and informed her that she'd been terminated, effective October 11, for walking off the job.

The plaintiff's doctor returned the FMLA forms two days later, diagnosing her as "suffering from anxiety and panic attacks." She sued New Hope for FMLA interference.

Notice provided

To state a claim for FMLA interference, a plaintiff must give notice to his or her employer of a need to take leave under the act. While the lower court found that the plaintiff's doctor's note was adequate notice, the court ruled in New Hope's favor because this notice was provided *after* the plaintiff's termination and was, therefore, provided too late.

Notice of FMLA leave must be provided "as soon as practicable," which has been interpreted to mean within one or two business days from when the need for leave becomes known to the employee.

The Eighth Circuit disagreed. According to federal regulations, notice of FMLA leave must be provided "as soon as practicable," which has been interpreted to mean within one or two business days from when the need for leave becomes known to the employee.

The plaintiff exhibited signs of severe anxiety on October 11, and was even instructed by New Hope's HR Director to go home because of these symptoms. The plaintiff then provided New Hope with a doctor's note by 9:30 the following morning. Both of these actions, the plaintiff successfully argued, put New Hope on notice "as soon as practicable."

The court dismissed New Hope's argument that the plaintiff had no FMLA rights as a discharged employee: The only reason she "walked off the job" was because the HR Director told her to go home. The court also noted that when the plaintiff delivered her doctor's note to HR she wasn't served with a notice of termination — she was handed FMLA forms. Accordingly, the Eighth Circuit overturned the lower court's decision.

Loophole not there

The employer in this case apparently thought it could evade FMLA requirements by claiming it was free to terminate the plaintiff as long as she'd not yet filed a formal application for leave under the act. In reality, New Hope had actual notice of the need for FMLA leave. By relying on a presumed loophole in the system, the employer's case failed.

The lesson here is clear: Never make assumptions about the law when it comes to FMLA leave — or any other employment matter. Always consult with counsel before acting. ♦

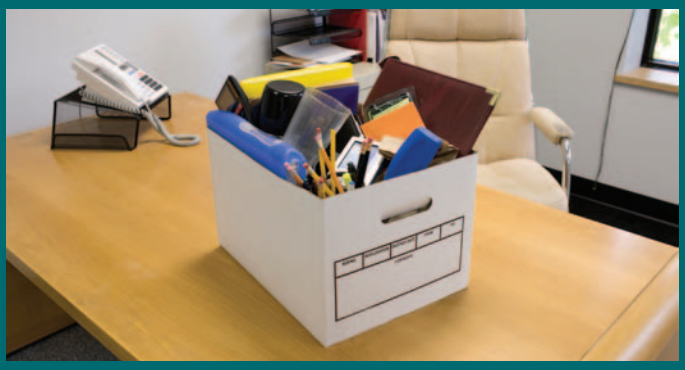
Notice of need — another perspective

Another perspective on what constitutes notice of the need to take leave under the Family and Medical Leave Act (FMLA) can be found in *Bosley v. Cargill Meat Solutions Corp.*, heard by the U.S. Court of Appeals for the Eighth Circuit. Here, the plaintiff was hired by Cargill in 2003. On Feb. 1, 2008, a co-worker who carpooled with the plaintiff informed their supervisor that the plaintiff had reported being too depressed to work.

The company required employees to use a formal call-in procedure to notify supervisors of absences. The plaintiff knew of this requirement, having used it more than 100 times. Nevertheless, she didn't call in on February 1 and went on to miss work that entire month without calling in. Cargill's policy stated that failure to comply with the call-in procedure on three consecutive work days would trigger voluntary termination. On February 16, a new supervisor took over and made inquiries about the plaintiff's absence. No one could explain why she was gone, so on February 27 the supervisor terminated the plaintiff.

The plaintiff didn't learn of her termination until March 3, when she went to Cargill to pick up FMLA leave forms. She then sued Cargill, alleging her termination violated the FMLA. The district court granted the company's motion for summary judgment, finding that the plaintiff had failed to provide adequate leave notice.

As was the case in *Clinkscale v. St. Therese of New Hope* (see main article), among the primary issues on appeal was whether the plaintiff had given FMLA notice "as soon as practicable." The plaintiff first contacted her employer 32 days after her first absence — even though she testified that her depression stopped being incapacitating around February 15 and her FMLA paperwork put that date as February 25. Because "as soon as practicable" has been defined as "one or two working days," the Eighth Circuit affirmed the district court's decision.



Are you consistent?

The importance of following procedural precedents

The limit of an employer's exposure to an age discrimination lawsuit is, in part, predicated on how consistently the company has followed its own disciplinary procedures. Case in point: *Hernán Acevedo-Parrilla v. Novartis Ex-Lax, Inc.*, a decision recently handed down by the U.S. Court of Appeals for the First Circuit.

Rating performance

In 1996, the plaintiff was offered the position of Maintenance and Engineering Manager at Novartis's Puerto Rico location. He held this position until his termination in 2007, when he was 57 years old.

The plaintiff's main responsibility was keeping the plant's facilities in optimum condition. For most of his career, he'd received positive performance reviews. But in 2003, Novartis hired a Site Leader who became responsible for the plant's overall operations and also became the plaintiff's supervisor.

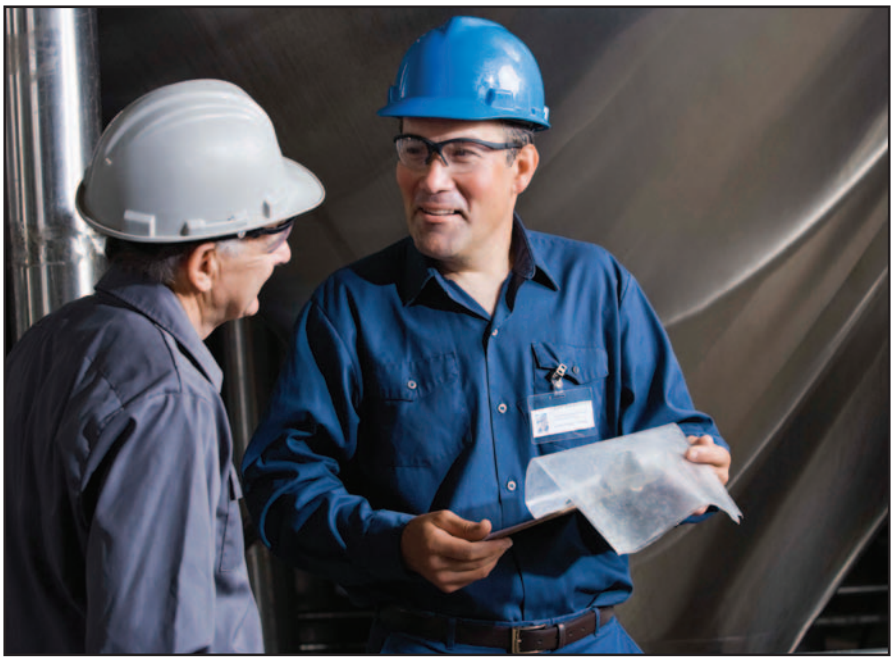
Shortly after this hire, several incidents occurred that led to the plaintiff receiving a 2004 annual performance review rating of "partially met expectations." In response, the plaintiff had to complete a Performance Improvement Plan (PIP) for March 22, 2005, to June 22, 2005. He successfully completed the PIP and received a 2005 annual performance review rating of "fully met expectations" from the Site Leader.

In 2006, however, the Site Leader again held the plaintiff responsible for several incidents that resulted in a mixed annual performance review. The plaintiff was then terminated by the Site Leader on Feb. 23, 2007 — unusually, without prior notice.

Meeting expectations

The plaintiff was replaced by a 34-year-old female employee in late February 2007. Her first year proved to be tumultuous. A June 2007 report indicated that, because of improper sanitation, the plant's mold and yeast counts had increased. Then an October 2007 department audit revealed persistent procedural violations.

Despite these incidents, the Site Leader rated the plaintiff's replacement as having "fully met expectations" in her 2007 annual performance review. The following year, the plant experienced a string of incidents in which various pests, including rats, insects and a lizard, entered the facility. Nevertheless, the Site Leader again rated the plaintiff's replacement as having "fully met expectations."



Presenting the evidence

In early 2008, the plaintiff sued Novartis, alleging he was terminated in violation of the Age Discrimination in Employment Act (ADEA). Several facts appeared to support his allegation. When the Site Leader was hired, he asked the HR Manager to investigate "the inclinations" of employees "who had reached retirement age" to determine "what their wishes were regarding leaving the company." The HR Manager testified that the Site Leader made this request pursuant to a "recruitment plan" to replace retirement-age workers.

Also, after the Site Leader took over, about 140 employees were hired — 114 of whom were under 40. Meanwhile, 17 employees were fired — 15 of whom were over 40.

Moreover, the HR Manager at the time of the plaintiff's termination couldn't explain why the plaintiff hadn't received prior notice of his termination and stated that he'd never discussed (let alone recommended) the plaintiff's termination with the Site Leader.

The plaintiff alleged that on two occasions the Site Leader made "ageist" comments to him. Finally, evidence showed that the plaintiff wasn't responsible for many of the incidents noted by the Site Leader in his poor performance reviews. Despite these findings, the district court granted Novartis's motion for summary judgment. The plaintiff appealed.

Making a showing

Because Novartis offered a legitimate, nondiscriminatory reason for the plaintiff's termination — not meeting the company's expectations — the burden was on the plaintiff to prove that this reason was pretext for age discrimination. He needed to offer "minimally sufficient" evidence of pretext as well as a discriminatory motive.

The First Circuit began by analyzing the sufficiency of Novartis's assertions for discharge. It noted there were material issues of fact as to whether the plaintiff was to blame for several of the incidents cited as triggers for his termination — and that two of the incidents occurred before the plaintiff's PIP. The HR Manager testified that, under Novartis policy, once an employee successfully completes a PIP the factors that led to the PIP couldn't be used to support a termination decision. Accordingly, the court found that the plaintiff had offered "minimally sufficient" evidence of pretext.

Next, the First Circuit looked at whether the reason for this pretext was an attempt to cover up the employer's real motive: age discrimination. Here the court relied on the:

- Alleged "ageist" remarks made by the Site Leader,
- Differences in treatment between the plaintiff and his younger replacement,
- Series of employment decisions beginning in 2003 showing an "invidious pattern of age-related discharges or forced early retirements" and youthful hires, and
- HR Manager's testimony that the Site Leader wanted to replace workers of retirement age.

The court concluded that, based on these factors, the plaintiff had sufficient evidence to allow a trial on his claim of age discrimination.

Following policy

This case demonstrates the importance of following past practices and stated policies in making disciplinary decisions. Act precipitously and fail to follow precedents and policy, as Novartis did here, and a court may find evidence of unlawful discrimination. ♦

Gone but not forgotten: An ADA case

It's tempting to think that once a worker leaves your employ any and all legal exposure ceases to exist. But a call about a job reference could bring that former employee right back into your midst — as a liability risk. This was the case in *Equal Employment Opportunity Commission v. Thrivent Financial for Lutherans.*

Unexplained absence

The plaintiff was hired on July 6, 2006, by technology consulting agency Omni Resources Inc. as a temporary programmer for Thrivent Financial for Lutherans. On November 1, he failed to report to work and didn't notify anyone at Thrivent of his absence. The plaintiff's supervisor then contacted his Omni account manager, who said that he hadn't heard from the plaintiff either.

The Omni account manager e-mailed the plaintiff requesting that he call either Omni or Thrivent to explain what was going on. Several hours later, the plaintiff replied to both supervisors via e-mail and stated that he'd been in bed all day suffering from a severe migraine. The plaintiff apologized for failing to communicate sooner, but said

he'd been incapacitated for the entire day and was only then starting to feel better. The plaintiff's e-mail went on to explain his history of migraines.

Reference check

A month after this incident, the plaintiff quit Thrivent and tried to find another job. Three prospective employers rejected his application after performing reference checks.

Suspecting that Thrivent — and specifically his former supervisor — were behind these lost opportunities, the plaintiff hired a reference checking agency to help him investigate. An agency employee, pretending to be a prospective employer, spoke with the former supervisor, who said that the plaintiff "has medical conditions [involving] migraines. I had no issue with that. But he would not call us. It was the letting us know."

On learning of this conversation, the plaintiff filed a charge with the Equal Employment Opportunity Commission (EEOC), claiming disability discrimination in violation of the Americans with Disabilities Act (ADA). The EEOC then commenced an instant action on the plaintiff's behalf, alleging that Thrivent had violated the ADA's confidentiality provision.

Nature of an inquiry

With certain exceptions not at issue here, the ADA prohibits employers from disclosing an employee's medical information obtained through medical examinations and inquiries. In district court, the EEOC argued that Thrivent had violated this confidentiality provision by "revealing to [the plaintiff's] prospective employers his confidential medical information obtained from a medical inquiry." Thrivent countered by arguing that it hadn't learned of the plaintiff's condition through a medical inquiry and, therefore, the confidentiality provision didn't apply. The court agreed with Thrivent and granted its motion for summary judgment.

On appeal, the EEOC advanced an alternative argument: that the ADA's confidentiality provision covers medical information obtained in the course of conducting "inquiries into the ability of an employee to perform job-related functions." In other words, the EEOC argued that an "inquiry" applied to all "job-related inquiries."

The ADA generally prohibits employers from disclosing an employee's medical information obtained through medical examinations and inquiries.

The U.S. Court of Appeals for the Seventh Circuit rejected this argument by noting that the "subject matter discussed in the body of [the ADA's confidentiality provision] confirms that the word 'inquiries' does not refer to all generalized inquiries, but instead refers only to medical inquiries." Accordingly, the court affirmed the lower court's decision.

Delicate interaction

As this case shows, even if an employee's actions are lawful, specific negative comments about a former worker during a reference check can be provocative. If someone makes them, the company may find itself paying legal fees to combat an upset party — even if that party has an otherwise meritless case. To avoid such potential difficulties, many employers choose to provide only neutral references confirming position held and dates of employment. ♦

Employers, know your break policies

Lunch hours and break periods have been known to produce more than a few conflicts over whether and how employees should be compensated during this down time. The issue gets even more contentious when workers' breaks are interrupted by job-related duties.

In *White v. Baptist Memorial Health Care Corporation*, the U.S. Court of Appeals for the Sixth Circuit considered whether a district court had correctly dismissed a plaintiff's claim for unpaid compensation for time worked during meal periods.

Policy in play

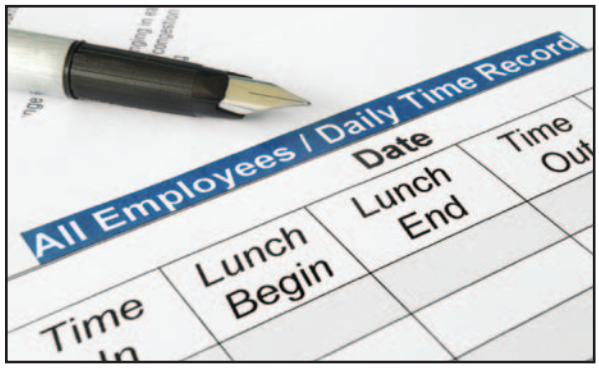
Baptist Memorial Health Care Corp. had a policy wherein employees working shifts of six or more hours received an unpaid meal break that was automatically deducted from their paychecks. The policy also provided that if an employee's meal break was missed or interrupted because of a work-related issue the worker would be compensated for the time spent working.

Employees were instructed to record all time spent performing work during their meal breaks in an "exception log." This policy was set forth in an employee handbook that every employee received during orientation.

Failure to report

The plaintiff worked as a nurse at Baptist for about two years. Because she frequently worked shifts of six or more hours, the plaintiff often was subjected to the automatic deduction policy. She admitted that when she used the exception log she was compensated for the time entered therein.

The plaintiff also admitted that there was a procedure in place designed to correct payroll errors. The affected employee would report any error to his or her department head, who would then resolve the issue "immediately." Despite the conceded effectiveness of this payroll corrective procedure, the plaintiff never used it to collect for times she'd individually missed meal periods — as opposed to times when her entire nursing unit had worked through a break — because she felt it would be "an uphill battle."



Eventually, the plaintiff stopped reporting her missed meal breaks in the exception log. Although she would inform her supervisors and human resources that she'd missed meal periods, she never told them that she wasn't getting paid.

Reasonable process

The plaintiff eventually sued Baptist, alleging that its failure to pay her for missed meal periods constituted violations of the Fair Labor Standards Act (FLSA). Baptist filed a motion for summary judgment, which the district court granted.

On appeal, the central issue was whether Baptist knew or had reason to know that the plaintiff wasn't being compensated for time spent working during meal periods. If yes, that time had to be considered "working time" for which compensation was required.

The Sixth Circuit noted that, if an employer establishes a reasonable process for an employee to report uncompensated work time, nonpayment won't violate the FLSA should the employee fail to follow this process. Finding the exception logs to be just such a reasonable process, the court held that Baptist hadn't violated the FLSA. The plaintiff had failed to report her uncompensated time in those very logs.

Favorable results

Wage and hour cases have been proliferating in recent years. It's important that employers check and double-check that they're following not only federal labor laws (such as rules regarding overtime and exempt vs. nonexempt employees), but also their own compensation practices. As this case shows, consistently following sound policies can produce favorable results in court. ♦