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Employers May Be Liable Under the FMLA for Attendance-Related Disciplinary Action

By Rod M. Fliegel

As noted in Littler's June 2001 ASAP, recent cases underscore the need for employers to avoid hasty decisions about an employee's eligibility (or non-eligibility) for time off from work under the Family Medical Leave Act (29 U.S.C. §§ 2601 et seq.). The message from these cases is crystal clear: in some jurisdictions, courts expect *literal* and *timely* compliance with the FMLA's notice requirements regarding FMLA eligibility.

Another recent case, *Bachelder v. America West Airlines*, ___ F.3d ___, 2001 U.S. App. LEXIS 17691 (9th Cir. Aug. 8, 2001), reiterates this important message, but also illuminates another thorny area of FMLA compliance: managing attendance problems without "interfering" with an employee's FMLA rights. In *Bachelder*, the Ninth Circuit held that an employer may be liable for damages under the FMLA for attendance-related disciplinary action even if management *honestly*, albeit mistakenly, believed the absences in question were not covered by the FMLA.

Penny Bachelder worked for America West Airlines, Inc. ("America West") as a passenger services supervisor from 1993 until her termination in 1996. In 1994, Bachelder took five weeks of FMLA leave for her own illness. In 1995, she took approximately 12 weeks of maternity leave under the FMLA. Bachelder also used sick leave several times in 1994 and 1995.

In January 1996, America West had a "corrective action discussion" with Bachelder regarding her attendance record. Management was concerned about her use of sick leave *and* FMLA leave. Bachelder was instructed to improve her attendance record. She was also required to meet with management to evaluate her progress.

The next month, February 1996, Bachelder was absent from work for three more weeks. Bachelder submitted two doctor's notes in connection with her absences. America West believed that, as of February 1996, Bachelder was not yet entitled to a fresh 12-week allotment of FMLA leave. Thus, management did not designate the absences as FMLA leave and did not attempt to determine if Bachelder's absences were qualified under the FMLA.

Bachelder returned to work in March 1996. In April 1996, she called in sick for one day. Within a week of that absence, Bachelder was fired. The termination letter stated three reasons for management's decision: Bachelder's 16 absences since the corrective action discussion, her failure to properly administer her department's Employee of the Month program, and her subpar personal on-time performance and that of the area of the airport for which she was responsible.

Bachelder filed suit alleging, among other things, that America West fired her for using FMLA leave in February

1996. America West countered that, because the company used the “rolling year” method rather than the “calendar year” method in calculating eligibility for FMLA leave, Bachelder’s leave in February 1996 was not covered by the FMLA. The district court agreed with America West, granted partial summary judgment, and denied Bachelder’s cross-motion for summary judgment. A bench trial ensued on the issue of whether America West fired Bachelder for using FMLA leave in 1994 and 1995. America West prevailed at trial. Bachelder appealed the summary judgment and the judgment entered after the bench trial.

Ninth Circuit’s Decision

On appeal, the Ninth Circuit focused exclusively on the summary judgment proceedings (i.e., the 1996 absences). Ultimately, the court reversed the summary judgment for America West, directed the district court to grant Bachelder’s cross-motion for summary judgment, and remanded the case for further proceedings. The court’s reasoning was twofold: first, Bachelder’s 1996 absences were protected by the FMLA; second, America West improperly considered these absences in deciding to terminate her employment.

Preliminarily, the court characterized Bachelder’s lawsuit as one for “interference” with her FMLA rights, rather than one for discrimination or retaliation. 29 U.S.C. § 2615(a)(1); 29 C.F.R. § 825.220 (c). In order to prove an interference claim, Bachelder only had to show that her FMLA leave was a “negative factor” in management’s termination decision; she did not have to prove that America West intended to punish her for using FMLA leave.

The court next decided that Bachelder’s 1996 absences were covered by the FMLA. The court noted that, while the FMLA’s implementing regulations give employers four choices for calculating the FMLA

“leave year” (29 C.F.R. § 825.200(b)), they do not state how the employer should indicate its choice. Nonetheless, employers have an implied duty to notify employees as to which leave year they are using. America West’s FMLA policy in its employee handbook failed to satisfy this implied notice obligation because it merely stated that employees were “entitled to a total of 12 weeks of FMLA leave during any 12-month period.” Furthermore, because America West never notified its employees that it used the “rolling year” method for calculating leave (29 C.F.R. § 825.200(b)(4)), by law, it had to calculate Bachelder’s eligibility for leave in the way most advantageous to her. 29 C.F.R. § 825.200(e). Because Bachelder was entitled to a fresh 12-week leave allotment starting on January 1, 1996, under the “calendar year” method, her absences were covered by the FMLA.

The court further held that Bachelder’s February 1996 absences had been a negative factor in America West’s termination decision; Bachelder’s termination letter stated as much. Further, the decisionmakers testified that Bachelder’s absences were the primary reason for her termination. Even though there were two independent grounds for the decision, they were tainted by improper consideration of the 1996 absences. Furthermore, because Bachelder did not have to prove intentional interference with her rights, America West’s claim that the error was made in “good faith” was wholly unavailing. And, to the extent that it was unclear whether Bachelder had a “serious health condition in February 1996,” this ambiguity would be held against America West, because an employer, having been notified of the need for leave, has an affirmative duty to determine if the leave qualifies for FMLA protection. 29 C.F.R. § 825.302(c).

Lessons From *Bachelder*

FMLA Eligibility

The Ninth Circuit’s decision serves as

another forceful reminder to employers of the need in some jurisdictions for *literal* and *timely* compliance with the FMLA’s notice requirements regarding FMLA eligibility. Human resources professionals or in-house counsel should review the company’s FMLA policies to ensure, among other things, that the “leave year” is clearly defined. If not, the employer should clarify the policy and reissue it with the requisite 60-day notice. 29 C.F.R. § 825.200(d)(1). In addition, the employer must evaluate the impact of the transition as to *individual* employees to make sure they “retain the full benefit of 12 weeks of leave under whichever method affords the greatest benefit to the employee.” *Id.*

In all circumstances, employers must timely notify employees of their *ineligibility* for FMLA leave. The federal Department of Labor (“DOL”), the agency responsible for implementing the FMLA, has declared that an employer *who mistakenly* confirms an ineligible employee’s eligibility “may not subsequently challenge the employee’s eligibility.” 29 C.F.R. § 825.110(d). For further discussion, please refer to “Recent Cases Underscore the Need to Avoid Hasty Decisions About an Employee’s Eligibility for FMLA Leave,” Littler A.S.A.P. (June 2001).

Attendance Control Policies

The Ninth Circuit’s decision also suggests the need for *ample due diligence* before employees are disciplined for attendance problems. At a minimum, employers should implement programs to track and document absences and the stated reasons therefor, adhering to the medical privacy laws. Human resources professionals and in-house counsel should be conversant with the company’s FMLA policies, and should know both how to identify *potentially* FMLA-qualifying absences and what to do in *ambiguous* circumstances. Since good faith mistakes can be held against the employer, it is best to avoid mistakes in the first instance. Of course, employers

should also evaluate absenteeism issues with regard to potential issues under the Americans With Disabilities Act (“ADA”). See “Exacerbating the Exasperating: Applying Attendance Control Policies to Workers with Disabilities,” Littler A.S.A.P. (Feb. 2001).

Conclusion

FMLA eligibility and attendance-control issues are far from unmanageable, but do require serious and thoughtful consideration. Local employment counsel can help you understand the FMLA and related laws, such as the ADA, and can work with you to implement FMLA policies, conduct training, and evaluate the risks of potential liability.

Rod M. Fliegel is a shareholder in Littler Mendelson’s San Francisco office. If you would like further information, please contact your Littler attorney at 1.888.Littler, www.littler.com, or email info@littler.com, or Mr. Fliegel at RFliegel@littler.com.
