Fenwick Employment Brief

September 15, 2010
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TWO FMLA CASES HIGHLIGHT PITFALLS FOR EMPLOYERS

Two recent federal appellate decisions highlight some of the procedural pitfalls that lurk within the federal Family and Medical Leave Act ("FMLA").

In *Murphy v. FedEx,* a decision from the Eighth Circuit Court of Appeals, FedEx terminated the employment of Plaintiff Susan Murphy, a FedEx truck driver, while she was out from work following her husband's death. FedEx initially granted Murphy FMLA leave to care for her husband, who had fallen gravely ill. He then passed away, and FedEx offered Murphy three days of bereavement leave, after which Murphy's supervisor informed her that her FMLA leave had ended. Murphy told her supervisor she needed an additional 30 days off to "take care of things," and the supervisor replied that was "not a problem" and he would advise Human Resources. He did not indicate that Murphy needed to contact HR or complete any additional steps to obtain FMLA leave. However, HR denied Murphy's request for additional time, and FedEx terminated her employment for being absent from work on an unapproved absence.

Murphy sued FedEx for wrongful termination and unlawful interference with her FMLA rights. FedEx defended primarily on the theory that Murphy failed to give FedEx sufficient notice that: (i) her request for additional leave may be covered by the FMLA, and (ii) that she actually suffered from a serious health condition. Murphy prevailed at trial, and FedEx appealed.

While the Eight Circuit remanded the case to trial for further proceedings, primarily based on faulty jury instructions, the court concluded that material issues of fact existed as to two key issues. First, the court concluded that it was possible for a jury to find that, when Murphy told her supervisor she needed to "take care of things" following her husband's death, coupled with the supervisor's knowledge that Murphy's husband had passed and that her mental state was impaired, Murphy placed FedEx on notice that she needed additional FMLA leave. Second, the court concluded that it was possible for a jury to conclude that Murphy reasonably relied on the supervisor's initial authorization of her request. In that regard, the court held that "an employer who makes an affirmative representation that an employee reasonably and detrimentally believed was a grant of FMLA leave can be estopped from later arguing that the employee was not in fact entitled to that leave because she did not suffer from a serious health condition."

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In *Branham v. Gannett Satellite,* a decision from the Sixth Circuit Court of Appeals, Plaintiff Deborah Branham was terminated from her job as a receptionist for *The Dickson Herald* for excessive absenteeism. Over the course of three weeks, Branham failed to report for work based on alleged illness. When Branham first became ill, she was examined by a doctor who released her to return to work immediately. However, Branham informed management that she remained ill and unable to work. Several days later, Gannett received a medical certification form from Branham's doctor indicating that she could perform her full duty as of the day after her medical appointment and did not require medical leave. A few more days passed without Branham reporting to work, and management called her to advise that her job was in jeopardy if she did not return to work or produce medical certification of her need for FMLA leave. Branham responded that another doctor at the same clinic could "clarify her status" and her need to be absent from work. On the fifteenth day after Branham's absence from work commenced, Gannett terminated her employment. Later that same day, a nurse practitioner faxed a certification to Gannett stating that Gannett suffered from a serious health condition and could not return to work for another six weeks.

As in *Murphy v. FedEx,* Branham sued for wrongful termination and interference with her FMLA rights. A trial court dismissed the claims based primarily on the fact that Gannett lawfully relied upon the initial certification, which cleared Branham to return, in terminating her employment. On appeal, the Sixth Circuit reversed and sent the case back for trial.

An employer may require an employee to provide a medical certification to support a request for FMLA leave. However, the employer must allow the employee fifteen (15) calendar days to provide the certification. The court concluded that Gannett never properly triggered Branham's duty to provide a medical certification supporting her request for leave. Specifically, no one communicated to Branham in writing the requirement to provide a medical certification, that it was due in 15 days, or the consequences of failing to return an adequate certificate.

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Murphy and *Branham* highlight the importance under the FMLA of clear and precise communication with employees regarding their rights and responsibilities when seeking a protected leave of absence, and the severe consequences of failing to comply with the unique notice and timing features of the law. The decisions further emphasize the need for employers to train managers on these requirements.

COURT REVIVES ADA REASONABLE ACCOMMODATION CLAIMS BY DEAF UPS WORKER

In *EEOC v. UPS*, the Ninth Circuit Court of Appeals reversed the dismissal of Americans with Disabilities Act ("ADA") claims brought on behalf of a deaf worker, where issues of fact existed as to whether UPS reasonably accommodated the employee's hearing disability.

UPS employed Mauricio Centeno as a junior clerk in its Accounts Payable Department. Centeno is deaf and his primary language is American Sign Language, with English reading and writing skills at a fourth or fifth grade level. The AP Department held regular staff meetings that Centeno was expected to attend. UPS provided meeting notes to Centeno as an accommodation, which Centeno would receive after the meeting. Centeno notified his supervisor that he did not understand the notes; that he could not meaningfully participate in the meetings because he received the notes after the meetings; and he requested a sign language interpreter. UPS denied Centeno's multiple requests for a sign language interpreter. Instead, UPS arranged for an employee to sit with Centeno and write out notes during the meetings, but Centeno found this accommodation to be inadequate as well. Centeno also sought, and was denied, an interpreter to help him improve his skills with Microsoft Excel, and to help him read and understand a warning that he had received for violating the company's anti-harassment policy.

The EEOC filed suit on Centeno's behalf for failure to reasonably accommodate his deafness. A lower court dismissed the lawsuit, but the Ninth Circuit reversed and remanded the case for trial. The Ninth Circuit affirmed a basic but important tenet of ADA accommodation law: an employer has discretion to choose between effective accommodations and need not implement an employee's requested accommodation, if other reasonable accommodations are available that will accomplish the same result. However, the Ninth Circuit held that issues of fact existed as to whether UPS' accommodations in the meetings and with respect to the Centeno's Excel training and reading were reasonable, and whether UPS otherwise sufficiently engaged in the interactive process with Centeno regarding accommodations generally.

This case highlights the fact-specific nature of ADA reasonable accommodation cases. By hiring an employee with a serious hearing impairment and very limited reading skills, UPS became duty-bound to engage in the interactive process and to explore specific accommodations, i.e. reading a written warning, that in many other working environments would simply not be reasonable.

EMPLOYER GROUP HEALTH PLANS: SELECTED HEALTH CARE REFORM CHANGES FOR 2011

A number of key provisions of the Patient Protection and Affordable Care Act of 2010 ("PPACA") that affect employer-sponsored flexible spending accounts and group health plans will take effect in January 2011.

Employers should be mindful of how these upcoming changes will affect their plans, and expect changes in the administration of such plans by insurers and third-party providers.

Because PPACA is a complex statute and regulatory guidance is still emerging, look for additional FEB updates in the future as additional provisions of PPACA take effect and are clarified.

Unless otherwise noted, group health plan changes are effective for the first plan year beginning after September 23, 2010 (i.e., January 1, 2011, for most group health plans).

Flexible Spending Accounts

Effective January 1, 2011, flexible spending account ("FSA") participants may no longer be reimbursed for the cost of over-the-counter medicines. However, prescription copayments may still be reimbursed through the FSA plan.

There is no change in 2011 to the pretax amount participants may contribute to a FSA. However, beginning in 2013, such amounts will be capped at $2,500 per year; in subsequent years, the cap will be adjusted for inflation.

Group Health Plans

(1) Coverage of adult children. Employer group health plans must offer coverage to the adult children of employees until age 26. Coverage must be offered even if such children are married or do not qualify as the employee's tax dependents. From 2011 through 2013, a "grandfathered" group health plan (generally, a group health plan in existence on March 23, 2010) may exclude nondependent adult children who are eligible for coverage under another employer's group health plan. However, starting with the 2014 plan year, such exclusion would no longer apply.

(2) Limits on coverage under the group health plan. A group health plan (whether grandfathered or not) may no longer impose lifetime limits on "essential health benefits" payable under the plan. Furthermore, while plans may still impose certain "restricted annual limits" on benefits, such limits will disappear completely starting in 2014.

(3) Nondiscrimination. Currently, Internal Revenue Code Section 105(h) applies certain nondiscrimination rules to employer group health plans that are self-insured or self-funded. Starting in 2011, insured group health plans (except for grandfathered plans) must also satisfy these rules.

(4) Preexisting conditions. Group health plans (whether grandfathered or not) may not impose preexisting condition exclusions on children under age 19. Starting in 2014, this provision is extended to preclude the imposition of preexisting condition exclusions on <u>any</u> plan participant.

(5) Development of uniform summary of plan benefits. By March 2011, the federal government must develop a model or template summary of benefits for use by group health plans. Group health plans must become familiar with this model and use it to develop their own summary of benefits and explanation of benefits provided under the plan by March, 2012. This summary must be distributed to participants prior to plan enrollment (or re-enrollment). In the event plan benefits are modified, revised summaries must be prepared and distributed.

Form W-2 Reporting

Beginning with the Form W-2 covering employees' 2011 compensation, employers must disclose the value of employees' group health plan coverage.

NEWS BITES

Uncontested Administrative Findings Preclude State Law Suit on Same Grounds

In *Murray v. Alaska Airlines, Inc.,* Kevin Murray, a quality assurance auditor for the airline, raised safety concerns with the FAA, which led to an airline facility being shut down and Murray's position being eliminated. Murray filed a Whistleblower Protection Act administrative complaint against the airline with

the United States Department of Labor. The DOL found that Murray had engaged in protected whistleblowing activity, and that his termination constituted an adverse employment action. However, the DOL found no causal connection between Murray's safety complaints and eventual termination, thus the DOL dismissed the complaint. Murray was notified that he had a right to object to the findings, but if he did not do so in 30 days, the decision would become final and not subject to judicial review.

Murray never filed objections, but later filed suit in a California state court for wrongful termination and retaliation. The airline removed the case to federal court, which dismissed the lawsuit. On appeal, the Ninth Circuit asked the state supreme court to opine as to whether Murray was collaterally estopped from pursing his claims through the courts. The supreme court held that Murray's failure to take the steps to withdraw his administrative complaint, or exercise his statutory right to a formal de novo hearing of record before an administrative law judge, and failure to exercise his statutory right to appeal any adverse findings and decisions rendered the DOL's findings final and nonappealable in subsequent court actions between the same parties.

Court Finds Time Spent Changing Clothes Not Compensable and Time Spent Walking To and From Locker Rooms Compensable

In *Franklin v. Kellogg Co.,* the Sixth Circuit Court of Appeals ruled that time spent changing into and removing company-provided uniforms and safety equipment by employees of the food maker is not compensable, while the time spent walking to and from locker rooms and their work areas is compensable. Federal law excludes time spent "changing clothes" from measured working time if the time has been excluded by custom or practice under a collective bargaining agreement. The Sixth Circuit found that the items Kellogg asked its employees to wear were clothes under the definition of the federal law and Kellogg had a bona fide custom or practice of nonpayment for time spent changing clothes, and therefore that time fell under the federal exception. As to time spent walking between the locker room and the time clock, the continuous workday rule requires compensation for employees for any walking time that occurs after the beginning of the employee's first principal activity and before the end of the employee's last principal activity. The Sixth Circuit held that because wearing the uniform was required by Kellogg, and wearing the uniform and equipment primarily benefits Kellogg, changing into and removing uniforms were principal activities. As such employees were entitled to payment for time spent walking both after changing into and before removing the uniforms.

Court Finds Computer Crashes Too Common to Qualify as an Abnormal Working Condition

A Pennsylvania state court affirmed the denial of a workers' compensation benefits claim that was based in part on alleged stress triggered by computer crashes. In *DeSalvo v. Workers' Compensation Appeal Board*, the court held that an employee who filed a claim against his employer for work-related aggravation of pre-existing mental conditions, had not met his burden of showing abnormal working conditions created the aggravation. DeSalvo worked for Daily's Juice as an on-call computer-technician. He claimed that the alleged stress of wearing a beeper and being on call 24 hours a day/7 days a week created abnormal working conditions and as proof of his level of stress, pointed to the fact that he was forced to take time off from work for stress after a computer crashed twice in one day. The court held that these conditions did not indicate a level of stress above one's subjective reaction to normal working conditions, and affirmed the denial of benefits by the state's Workers' Compensation Appeal Board.