



FMLA Claim Stands, Despite Employee's Stated Intention Not to Return to Work

On September 2, 2003, a federal district court in Illinois held that an employee may bring a claim against her former employer for terminating her while on Family and Medical Leave Act ("FMLA") leave, even though she did not intend to return to work before the expiration of her approved leave. In *Mendoza v. Micro Electronics, Inc.*, plaintiff Paula Mendoza sued her former employer Micro Electronics ("Micro"), alleging, among other claims, that it terminated her during her protected FMLA leave. During her employment, Ms. Mendoza took a pregnancy-related FMLA leave. Micro confirmed the leave in a letter to Ms. Mendoza, incorrectly advising her the leave would expire on December 31, 2001 (when it actually expired on January 5, 2002). On January 2, 2002, Ms. Mendoza informed Micro, she would return to work in February 2002 (several weeks after the expiration of her approved leave). However, on January 4, 2002, Micro informed her that she had been terminated effective December 31, 2001 for exceeding her approved leave.

On its motion to dismiss, Micro argued that Ms. Mendoza's communicated intent to not return within the statutorily protected period defeated her FMLA claim. The court rejected this argument, noting that such intention may affect her damages, but did "not change the fact that [Micro] miscalculated the twelve-week period, and terminated Ms. Mendoza during her leave period." To avoid FMLA liability, an employer must wait until the protected leave expires to determine whether an employee will return to work and then take appropriate action.

This case underscores the importance of: (1) accurate calculations of protected leave periods and (2) careful thought before a termination decision is made during an employee's protected leave.

Court Ruling Emphasizes Importance of Good Evidence of "Essential Job Functions"

In a disability case, the Third Circuit Court of Appeals recently held that an employer failed to offer sufficient evidence that its requirement for a manager to arrive at work by 8:00 a.m. was an essential function of the job. In *Conneen v. MBNA America Bank*, plaintiff Margaret Conneen, a Marketing Production Manager, sued her former employer, alleging her termination for failure to timely arrive at work violated the Americans with Disabilities Act. The court dismissed Ms. Conneen's claim, concluding that she had caused the breakdown in the interactive process required by the ADA. However, the court rejected MNBA's

assertion that it was "essential" for Ms. Conneen to arrive to work by 8:00 a.m. The Third Circuit explained that the inquiry into whether a requirement is essential to a particular job is fact-based and should be based on all relevant evidence, including: (1) the employer's judgment regarding which functions are essential; (2) written job descriptions and (3) the employee's actual experience in the position. While the court recognized that employers may prescribe a starting time for its employees, MNBA offered no documentation that its 8:00 a.m. requirement was essential, nor any proof of injury that would result from a failure to meet the requirement.

This case demonstrates the care employers must exercise when evaluating the "essential functions" of a job. Employers must have concrete evidence to support their determination that a particular duty rises to the level of an essential function of a job.

Air France Defeats FMLA Claim; Held Not To Be "Joint Employer" Over Contracted Services Workers

On September 15, 2003, the Ninth Circuit Court of Appeals, which covers California, held that an employee's claim under the Family and Medical Leave Act ("FMLA") failed because the employee was not entitled to protection under the Act. In *Moreau v. Air France*, plaintiff Stephane Moreau, the Assistant Station Manager for Air France at San Francisco Airport, sued the carrier for: (1) denying his request for leave to care for his father and (2) terminating him when he took the leave despite the denial. Air France moved to dismiss the claim on the ground that the carrier fell within the FMLA "small operations" exception. The exception excludes an employee from FMLA coverage if the employer has less than 50 employees within 75 miles from a particular worksite. In response, Mr. Moreau argued that Air France was a "joint employer" of employees of third parties with whom it contracted for airport ground handling services, and as a result, the small operations exemption did not apply.

The district court granted summary judgment for Air France, and the Ninth Circuit affirmed. The court evaluated the employment relationship between Air France and the at-issue employees based on the totality of the circumstances and the "economic reality" of the relationship. Specifically, the court noted that Air France had no power to hire and fire, determine the rate or method of payment, keep employment records, or set or control work schedules or conditions of employment of the ground handling service employees employed by third parties. Moreover, the court found that Air France's indirect supervision over the ground handling service employees – necessary

to ensure compliance with laws and their customers' safety – did not establish the requisite “control” over the employees. Finally, the employees' work on Air France's premises was minimal, and the ground companies invested significant resources in their own equipment.

This decision provides a helpful checklist of factors for employers to consider when they analyze whether they employ the requisite number of employees to trigger compliance with the FMLA.

Jury Awards Over \$4 Million In Retaliation Case

On September 2, 2003, a jury awarded over \$4 million in compensatory and punitive damages to an employee terminated in retaliation for her involvement in addressing sexual harassment complaints. Stephanie Denninghoff, a nursing supervisor, worked for the defendant Bon Secours DePaul Medical Center (“DePaul”). She received complaints regarding a nurse's hugging, kissing, embracing and rubbing doctors and other staff members, and responded by warning the nurse about the inappropriate conduct. Following this counseling, the alleged harasser/nurse complained about unfair treatment, and ultimately resigned. Several doctors complained about Ms. Denninghoff's role in addressing the sexual harassment complaint; one even threatened to remove his business from DePaul unless it terminated Denninghoff and re-hired alleged harasser/nurse. In response to the pressure, DePaul forced Ms. Denninghoff to resign, allegedly for a breach of confidentiality, and the alleged harasser/nurse returned to work six days later.

The EEOC sued DePaul on behalf of Ms. Denninghoff for wrongful termination in retaliation for engaging in protected activity through her efforts to address the sexual harassment complaints. Through its \$4 million verdict, the jury put the medical center on notice that its treatment of Ms. Denninghoff was unconscionable. After trial, the EEOC's attorney poignantly stated: “This verdict sends a clear message to all employers, and in this case Bon Secours DePaul Hospital, that you cannot cover up the true reasons for dismissing someone, and that you cannot punish someone for doing what the law, and public policy, requires and protects.”