FMLA Insights
Guidance & Solutions for Employers

Manager's Loose Lips Sinks Employer's Chances of Dismissing FMLA Claim

By Jeff Nowak on November 15, 2011

When making difficult decisions about eliminating jobs, senior management surely may disagree as to "who" is cut and how it's done. However, after the decision is made, it is critical that management collectively support the decision and refrain from public dissension. When that dissension is shared publicly or with the affected employee, it can spell disaster.

Take a situation involving Laura Makowski. Makowski was employed as Marketing Director by SmithAmundsen LLC, a Chicago-based law firm. In December 2007, during the massive economic downturn, Makowski took maternity leave. One month later, during a firm retreat in January 2008, the firm's executive team decided to eliminate the positions held by Makowski as well as the firm's IT Director. The Executive Committee charged Molly O'Gara, Director of Human Resources, with the task of consulting outside counsel on the termination decision. O'Gara considered herself the "boss" with respect to HR policies and compliance and was regularly consulted on termination decisions.

According to Makowski, when she returned to pick up her belongings in early February after being terminated, O'Gara met her at the elevator. Shockingly, Makowski claims that O'Gara told her that she "was let go because of the fact that [Makowski] was pregnant and took medical leave" and that Makowski was one of several at the firm who were let go because they were pregnant or took medical leave. O'Gara allegedly didn't stop there, suggesting that Makowski should consult with an attorney, since there "might be the possibility of a class action."

Ouch.

You know how the rest of this story goes. Last week, a federal appellate court in Chicago ruled that Makowski's FMLA interference and retaliation claims (as well as a pregnancy discrimination claim) would not be dismissed, and that a jury must determine whether O'Gara's comments help establish that the firm interfered with Makowski's FMLA leave and ultimately terminated her because of her pregnancy and the use of FMLA leave. Makowski v. SmithAmundsen (pdf)

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A few lessons to be learned:

1. Whenever possible, involve senior management in RIFs and other employment terminations. This should include your senior HR executive. It is unclear from the case whether O'Gara was involved in the actual decision to terminate (or whether her sole task was obtaining employment counsel's blessing). However, when senior executives are not consulted on

significant business decisions, it can breed resentment. Resentment manifests itself in a variety of ways, such as a manager who blows off steam about the decision in public or to the affected employee.

2. *Loose lips sink ships.* After the debate has ceased and management has made the personnel decision, it is critical that any dissenters support the decision of the whole or that of the decisionmaker. The public front should be collective, and the message consistent. Clearly, we don't know all of the facts at issue in Makowski's situation. However, if O'Gara's comments are true, she obviously allowed her personal opinion to become public. In turn, it created a tremendous risk of liability for the firm, a decision that now will be placed in the precarious hands of a jury.

3. A *no-brainer reminder* to HR professionals: Be exceedingly careful when discussing with the employee the reasons for his/her termination, as this conversation will be dissected over and over again and used by the employee's attorney as evidence of alleged discrimination or retaliation. Whenever possible, seek the guidance of employment counsel in framing the reasons communicated to the employee so that you ultimately reduce the risk of liability.