

## FMLA: Employers Have Burden of Proof to Justify Failure to Reinstate Employees Returning from FMLA Leave

### Opinion underscores importance of training and reviewing reinstatement principles with counsel

By Gregory S. Fisher

March 21, 2011

The Family and Medical Leave Act (FMLA) is, in some respects, a strict liability statute. Employees returning from FMLA leave are entitled to reinstatement with very few exceptions. In an opinion issued March 17, 2011, the U.S. Court of Appeals for the 9th Circuit<sup>1</sup> underscored this liability by holding that employers have the burden of proof to justify failure to reinstate an employee returning from FMLA leave. *Sanders v. City of Newport*.

#### Case

Diane Sanders, who worked as a billing clerk for the City of Newport, Ore., took an extended leave under the FMLA because she was experiencing illness due to what her doctor diagnosed as chemical sensitivity issues related to the type of paper the city was using in its offices. After several weeks, Sanders' doctor cleared her to return, subject to the condition that she would not be exposed to the same type of paper. Although the city had stopped using the particular paper involved, it denied Sanders reinstatement because it said it could not guarantee that her workplace would be safe with respect to her chemical sensitivity illnesses.

Sanders filed suit alleging, among other things, interference with her FMLA reinstatement rights. The city contended that the jury should be instructed that Sanders had to prove that the city lacked reasonable cause to reinstate her. Taking the opposite view, Sanders contended that the burden of proof was on the city to show a justifiable reason for not reinstating her. The district court agreed with the city and adopted the city's proposed jury instruction. The jury found in favor of the city on Sanders' FMLA interference claim.

#### 9th Circuit

The 9th Circuit reversed, holding that the district court erroneously placed the burden of proof on the employee. The court said that the city's intent was not relevant to liability when evaluating an FMLA interference claim. Liability attaches when reinstatement rights are denied. Under the FMLA regulations, employers can avoid FMLA liability for denial of reinstatement only if they can show a legitimate reason for doing so. Consequently, an employer denying reinstatement has the burden of proof to justify its decision to deny reinstatement.

#### Observations

Employers should carefully evaluate facts when employees are returning from FMLA leave, and should not deny reinstatement without evaluating available evidence.

The FMLA includes procedures by which employers may request medical certification, recertification, and fitness-for-duty examinations. Employers should confer with counsel to ensure they understand their available options, and use these options to document and support their decisions.

In a case such as *Sanders*, the city may have been better off if it had honored the employee's reinstatement rights under the FMLA, then addressed the chemical sensitivity issues as a request for accommodation under disability law and made a determination whether it could reasonably accommodate whatever limitations the employee had.

#### FOOTNOTE

<sup>1</sup> The 9th Circuit sets controlling precedent for the federal courts in Alaska, Arizona, California, Hawaii, Idaho, Montana, Nevada, Oregon, Washington, Guam, and the Northern Mariana Islands.

This advisory is a publication of Davis Wright Tremaine LLP. Our purpose in publishing this advisory is to inform our clients and friends of recent legal developments. It is not intended, nor should it be used, as a substitute for specific legal advice as legal counsel may only be given in response to inquiries regarding particular situations.