

The Importance of Communicating with Employees on FMLA Leave – Sometimes You Can't Win for Losing

11/11/2011 Robert A. Dubault

No employer would deny the value of regularly communicating with employees on matters affecting the workplace, whether it be changes to insurance benefits, work schedules or policies and procedures. Doing so helps ensure your employees are meeting your expectations and that they know what to expect as it relates to their employment. Often times such communications are funneled through one department, such as Human Resources, to ensure accuracy and consistency. The same benefits that attend to communicating with your active employees also carry over to those who are off work on a leave of absence, including those employees who take leave under the Family and Medical Leave Act (FMLA). Because the FMLA prohibits employers from “interfering” with an employee’s right to take leave under the Act or “retaliating” against an employee who exercises his FMLA rights, employers must carefully manage communications with employees who take or wish to take time off under the Act. Several recent court cases bear this out.

In *Terwilliger v. Howard Memorial Hospital*, 2011 U.S. Dist. LEXIS 8577 (W.D. Ark. Jan. 27, 2011), an employee who received numerous calls from her supervisor while off on FMLA leave was allowed to pursue her claim that the supervisor’s conduct interfered with her right to take leave. The employee took approximately 11 weeks of FMLA leave for a back condition and subsequent surgery. While she was off, her supervisor called her weekly to see when she was going to return to work. During one call, the employee asked if her job was in jeopardy, and the supervisor replied that she should return to work as soon as possible. According to the employee, the supervisor also told her not to tell anyone else that the supervisor had informed the employee of her right to take FMLA leave. The employee returned to work and later was fired for attempted theft from a co-worker’s desk. Although the court dismissed the claim relating to her termination (finding that the employer had a good-faith belief that the employee had engaged in conduct that warranted termination under its work rules) and although there was no evidence that the employee returned to work before being fully released by her doctor, the court found that the supervisor’s weekly calls to the employee could have “chilled” the employee in the exercise of her legally protected right to take leave.

In contrast, in *Hofferica v. St. Mary Medical Center*, No. 10-6026 (E.D. Pa. Sept. 20, 2011), an employee who was terminated after she exhausted her FMLA complained that her supervisor interfered with her right to take FMLA leave by not returning her phone calls. In particular, the employee alleged that her supervisor’s failure to return her calls was evidence of the employer’s “ongoing antagonism” toward her for taking FMLA leave. The court held that the employee should be allowed to proceed with her claim and given the opportunity to prove that her supervisor’s refusal to return her calls was evidence of FMLA animus sufficient to support her retaliation claim.

Finally, in *Gardner v. Great Lakes Cheese Co.*, No. 1:2010-cv-00183, (N.D. Ohio, Sept. 28, 2011), an employee who exhausted her FMLA leave was terminated for exceeding the maximum number of points allowed under her employer's attendance policy. She claimed that despite her request, her employer's failure to provide her with an update on how much FMLA leave she had used (as required by regulation 825.300(d)(6)) interfered with her right to take FMLA leave. According to the plaintiff, she had asked for such updates on multiple occasions. Although her employer responded to those requests on previous occasions, it failed to do so only a few weeks before she was terminated. The employee thus claimed that she was prejudiced by not receiving the requested information. While not necessarily agreeing with the employee's argument, the court nevertheless allowed her to proceed with her FMLA interference claim.

So what's an employer to do? If you call an employee on leave too often, you might be found to have interfered with the employee's right to take leave and if you don't call, that might be used as evidence that you harbored some animus toward the employee for taking leave. Quite simply, someone at the company (preferably Human Resources) who understands the FMLA should be responsible for coordinating all communications with an employee who is off work on leave. That can help prevent an employee from receiving too many calls from a supervisor (or multiple supervisors) and it can help prevent the conversations from straying too far into work issues. After all, the employee is supposed to be "off work," and if he is getting repeated calls from the office on work-related issues, can you permissibly count that time as "leave time"? Also, coordinating the communications through Human Resources can help ensure that impermissible statements are not made or improper questions asked.

Finally, it is important to remember that the FMLA imposes a number of obligations upon employers to communicate with employees about their rights and obligations both before and during a leave period. Failure to comply with those obligations can, under the wrong circumstances, constitute interference with the employee's right to take leave. While not legally required, we think it advisable to communicate with an employee who is about to exhaust his or her FMLA leave as to how much leave remains and what will happen after the FMLA leave is exhausted. If the employee wants to ask for additional leave under your internal policies or under the Americans with Disabilities Act (ADA), this should prompt him to do so and the issue can be appropriately resolved beforehand. That is certainly much less likely to result in a surprise to the employee or a lawsuit for the employer than might be the case when the employee receives an after-the-fact letter telling him that he was terminated two weeks ago for failure to return from leave or violation of your attendance policy.

Leaves of absence under the FMLA and ADA can be extremely complicated. If you have questions about these situations, or about FMLA or ADA compliance in general, please let us know.