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EMPLOYMENT LAW QUARTERLY

Volume X, Issue II
Spring 2008

TIMELINESS: SEVENTH CIRCUIT UPHOLDS 15-DAY FMLA MEDICAL CERTIFICATION REQUIREMENT

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** By Stephen S. Zashin*

The Seventh Circuit Court of Appeals recently upheld summary judgment in favor of an employer that terminated a married couple where each spouse failed to provide timely medical certification for their absences in accordance with the employer's federal Family and Medical Leave Act ("FMLA") policy. In Townsend-Taylor v. Ameritech Services, Inc., the employer terminated both Diedre Townsend-Taylor and her husband, Ronnie, due to excessive unexcused absences.

Though Ameritech conceded that it could not shirk its responsibilities under the FMLA by outsourcing the administration of its policy, Ameritech contracted with an entity – FMLA Processing Unit ("FPU") – to administer its FMLA claims. Consistent with FPU's policy, an Ameritech employee who requests FMLA leave is given a "Certification of Health Care Provider" form and is told that his doctor must submit the completed form to FPU within 15 days, the minimum time employers must afford employees under the FMLA, "unless it is not practicable under the particular circumstances to do so despite the employee's diligent, good faith efforts." See 29 C.F.R. § 825.305(b). In practice, FPU gave employees 20 days before it considered the certification untimely.

In 2004, Ronnie Taylor missed several days of work to care for his child who had an infection. Upon his return on May 3, he requested FMLA leave and was given a Certification form. When FPU had not received a completed form on May 24, it issued a notice of denial of his FMLA leave request. The notice also provided that Ronnie would have an additional 15 days to submit proof of extenuating circumstances for his failure to timely file the Certification.

During the 15-day period for proof of extenuating circumstances, the child's doctor sent FPU a letter indicating that he had either faxed directly to FPU or given to the child's parents a completed Certification form on "at least 3 separate occasions." FPU denied that it had received the Certification form. Ronnie suggested that he had used his wife's form, crossing out her name and replacing it with his, when submitting the Certification to the child's physician. In addition to the employee's name, the preprinted form contained a barcode identifying the Ameritech employee. Ronnie speculated that, because he had used his wife's form, the Certification was placed in her file and not his own. The Certification form was never found in Diedre's FMLA file.

The Court was not persuaded. Finding the doctor and Ronnie's speculation questionable ("it is hardly likely that he handed the same form to the parents three times"), the Court concluded that – by knowingly using the wrong form, his wife's – Ronnie admittedly did not comply with FPU's Certification requirement. The Court further rejected Ronnie's argument that Ameritech should have allowed him to resubmit the physician's Certification following the May 24 notice, holding that by allowing Ronnie to provide "the Certification within a new, extended deadline – a scenario that could, in theory, repeat itself ad infinitum … a 'deadline' (under the Regulations) would have no meaningful significance and no actual consequence."

The Court similarly dismissed Ronnie's claims that the FMLA policy – which required completion of

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LET YOU GO: HOW TO AVOID LITIGATION WHEN TERMINATING AN EMPLOYEE

By Patrick O. Peters

The great majority of employment discrimination lawsuits and administrative charges result following the termination of an employee's employment. When an employee loses his/her job, the ex-employee has an increased economic incentive to consult with a plaintiff's attorney and/or pursue litigation or administrative relief and loses the disincentive to litigation inherent in an ongoing employer-employee relationship. Moreover, the employee's hurt feelings resulting from a sudden job loss can contribute to feelings of vengeful retaliation against the employer – justified or not – causing the employee to seek retribution in a legal forum.

The best defense against an employment discrimination and/or wrongful discharge lawsuit is developed prior to or at the time of termination, not after the lawsuit is filed. To that end, prudent employers should take steps to both avoid litigation and carefully execute the termination so as to increase their chances of defeating a discharged employee's claims.

NO SURPRISES. Throughout an employee's employment, employers should conduct regular performance evaluations and implement an objective system of discipline that includes documented reports of performance deficiencies. In addition, employers should clearly communicate their employment policies to employees, including any employee handbook, harassment policy, and the employee's job description. Documents evidencing an employee's employment history are vital to support an employer's non-discriminatory motive for terminating an employee's employment.

Immediately before terminating an employee, employers should consider suspending the employee to investigate any specific incidents that give rise to the termination. Employers have broad authority to conduct internal investigations. Employers should take advantage of this right, talk to as many supervisors, co-workers, and subordinates as necessary to learn all of the relevant facts.

Most importantly, employers should allow the subject employee an opportunity to respond prior to the official termination. The employee may admit some, most, or all of the accusations, and provide useful admissions that may benefit the employer in future litigation. Even if the employee admits nothing, the employer can limit the employee to one set of facts. It is better for employers to hear the employee's side of story before a possible deposition, months if not years following the termination.

TELL THE TRUTH. The best advice an employer can follow when terminating an employee is to give an honest reason for the employee's termination. This is not moral guidance, but sound legal counsel. As the saying goes, no good deed goes unpunished. Rather than identifying an employee's performance deficiencies as the catalyst for his termination, an employer might choose to "soften the blow" and tell the employee that he is being let go due to a reduction in force, or an economic lay off. This is a common mistake. The worst thing that an employer can do when terminating an employee is to give a dishonest reason for the termination that later will be cited as "pretext" for discrimination, retaliation, and/or wrongful discharge.

The communicated reason for the termination should also mirror the employee's documented performance deficiencies. Having a good reason for termination is not enough – the employer's statements and documentation must square with that good reason, and contrary statements or documentation will work against it.

BE PROFESSIONAL AND BE PREPARED. While an employer should speak truthfully when discharging an employee, employers should not use the opportunity to be gratuitously cruel or mean-spirited. "Rubbing it in" does no good for the employer and can create hard feelings on the part of the employee that can later result in an administrative charge or employment litigation. The difference between having a lawsuit and not having one may result from how the employer communicated the discharge.

Prior to a termination meeting, employers should keep news of an employee's impending discharge private and not allow the decision to "leak" out among the workforce. News of a termination should come from the employee's direct manager or supervisor at the end of the work day, in a private meeting with a witness (an HR employee or other manager), with minimal disruption to other employees.

At the termination meeting, employers should be firm and professional, but compassionate and respectful. Employers should summarize reasons for the termination and use specific examples. While employers should welcome questions and explain their rationale, they should avoid debating the decision with the employee.

TIE UP LOOSE ENDS. First, employers must make sure that the employee receives all owed compensation. Wage and hour litigation has increased rapidly and substantively favors the employee.

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the Certification by the medical provider – interfered with his FMLA rights. The Court reasoned that an employee could forge and/or embellish a doctor's letter. By requiring the provider to complete the form, the employer permissibly adopted, "reasonable, non-burdensome measures for preventing fraud. Reasonable measures are not *interferences* with rights." The Court concluded that if Ronnie was unsure as to whether his child's doctor had submitted the form, he was within his rights prior to the expiration of the 20-day deadline to check with FPU to make sure that the completed form arrived. "If it has not arrived, he can obtain an extension of time sufficient to enable him to assure FPU's receipt of the form. If his doctor does not cooperate – suppose he's on vacation and as a result unable to submit the medical certification in time – that would be an extenuating circumstance that could excuse missing the deadline."

Like her husband, Diedre similarly failed to adhere to FPU's policy relative to the FMLA medical certification requirement. Mrs. Taylor missed several days of work due to an undisclosed back problem. Upon her return to Ameritech, she requested FMLA leave and received a Certification form. "She waited 12 days after receiving the form to give it to her doctor, who did not get the completed form to FPU for another nine days, with the result that Mrs. Taylor missed the deadline" by a single day. In the notice denying her FMLA leave, FPU provided Diedre 15 days to establish extenuating circumstances for the failure to timely file the Certification form. During that period, Diedre's physician explained that her delay in returning the form resulted from the fact that she only worked two days per week.

For her part, Diedre testified that the day she presented the form to her doctor - 12 days after receiving it – was her first day off since returning to work. She also testified that her work hours were the same as the clinic where she was treated, from about 8:00 a.m. to 4:30 p.m. She later admitted, however, that the clinic would open as early as 7:00 a.m. and that she could have easily dropped the form off on her way to work. The Court dismissed Diedre's excuses and held that, even if her work hours mimicked the clinic's hours and her doctor was only available two days per week, she could have called the clinic and made arrangements to get the form to her doctor.

The Court further held that Ameritech's response to Diedre missing the deadline by one day was "harsh" but that "hers was a case of the last straw. She had a history of failed attempts to justify absences as being authorized by the FMLA. Both Taylors were problem employees, and Ameritech was not required to exhibit more patience than the law and its own rules required." The Court further concluded that "it is most unlikely that the back condition that precipitated her application for FMLA leave was a 'serious health condition,'" as there was no evidence she suffered from a chronic serious health condition and "it appears that she missed only three days of work."

As demonstrated by the holding of the Seventh Circuit, an employer may enforce reasonable time limits on an employee's submission of FMLA medical certification. Absent timely submission of the certification – assuming no evidence of extenuating circumstances – an employer may treat the absence as an unapproved absence and impose discipline up to and including termination.

*** Stephen Zashin** *is an OSBA Certified Specialist in Labor and Employment Law and has extensive experience in defending employers in FMLA litigation, as well as counseling employers on FMLA compliance. For more information about medical certifications or other questions about the Family and Medical Leave Act, please contact Stephen at 216.696.4441 or ssz@zrlaw.com.*

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"IT'S FOR WORK!!" – CAN (A) PDA LEAD TO UNINTENDED (OVERTIME) CONSEQUENCES?

*By Michele L. Jakubs

Advanced communication technology is becoming increasingly commonplace among all types of industries and employers. From virtual private networking ("VPN") applications that allow employees a secure "log in" to their company's server from a remote location using an internet connection, to company email becoming accessible anywhere, anytime with the use of a web-based interface, employees have more options available to them today to work from anywhere around the globe. Employers make work communications even easier when they provide their employees with a personal digital assistant, or PDA, such as a Treo, BlackBerry, or iPhone.

Oftentimes, employees with these devices and access to company technology "after hours" are exempt from federal Fair Labor Standards Act ("FLSA") and state regulations relative to overtime and the minimum wage. These include those employees that satisfy Department of Labor ("DOL") criteria for "exempt" employees and pass three "tests" depending on (a) how much they are paid, (b) how they are paid, and (c) what kind of work they do. Exempt employees must be paid on a salary basis, must make at least $455 a week, and must perform exempt job duties such as executive, professional, and administrative functions. Determining whether an employee is exempt requires a case-by-case analysis of the employee's job duties consistent with DOL guidance. While some job classifications (attorneys and other professionals, for example) are almost always exempt, others are not as clear (inside sales people are usually not exempt, while outside sales people are; similarly, while registered nurses are exempt, licensed practical nurses are not). When job duties overlap (a licensed engineer performing inside sales work, for example), an employer must analyze the employee's position to determine whether or not the FLSA and state overtime and minimum wage requirements apply.

These considerations come into play when dealing with the case of a nonexempt employee that has access to company e-mail from home and/or is issued a PDA. A common example is the nonexempt clerical worker who checks and sends email from home either before or after work. When workers are given PDAs – with unfettered access to company communications at all hours – the situation can become even more problematic. The FLSA requires employers to compensate nonexempt employees for any time spent on work-related tasks, even if those tasks involve checking and responding to e-mail from the comfort of a living room couch. Prudent employers should articulate clear policies to ensure that they comply with overtime and minimum wage requirements.

To avoid paying overtime, employers should have a policy in place that nonexempt employees may not check e-mail or return phone calls outside of normal business hours unless they have advanced authorization. Absent approval, employees should not work these hours. When a nonexempt employee violates this policy, the employer should reprimand the employee consistent with company policy. The employer must, however, pay the employee in accordance with the FLSA for the overtime that the employee worked.

Conversely, if an employer wants nonexempt employees to respond to phone calls or emails outside of regular working hours, the employer should have a system in place that requires employees to properly track their time. Such a system should facilitate paying employees for all hours worked. Either way, employers should implement a clear policy and make sure that it universally enforces that policy. The worst thing for an employer to do is to recognize that nonexempt employees are checking e-mail and returning phone calls outside of regular working hours and ignore it.

Additionally, employers should think carefully about which company employees are given outside access to the company server and email via a PDA. To limit liability, employers should only make the devices available to those employees who actually need them. The great majority of employees who utilize this technology are exempt; however, as these practices become more common and nonexempt employees are "wired" through a PDA or home computer, employers should be wary of potential wage and hour violations.

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SURVEY SAYS – SOME EMPLOYERS NOT COMPLYING WITH THE FMLA

**By Patrick M. Watts*

A recent study by the Families and Work Institute ("FWI") found that many employers fail to comply with the federal Family and Medical Leave Act ("FMLA"). Interestingly, the difference between large employers (18%) – those with more than 1,000 employees – and small employers (21%) that failed to comply with the FMLA was statistically insignificant.

The FMLA requires covered employers, those with 50 or more employees within a 75-mile radius, to provide at least 12 weeks unpaid leave and job restoration benefits to covered employees in certain circumstances such as the employee and/or family member's serious health condition, the birth of a child, or adoption and/or foster-care placement. In addition, the FMLA was recently expanded to include "qualifying exigencies," as that term is to be defined by the Department of Labor, related to military service.

The 2008 National Study of Employers conducted by the FWI found that 24% of covered employers did not offer at least 12 weeks of paternity leave; 15% did not offer at least 12 weeks of maternity leave; 19% did not offer adoption and/or foster-care leave; and 16% did not offer FMLA benefits to their employees for the care of an employee's spouse or children with serious health conditions.

Employers – especially growing employers who, as they add employees, become covered employers under the FMLA – should regularly update their leave policies and train their human resource personnel to ensure that they are complying with the FMLA. Moreover, employers with covered employees in different states must be aware of and comply with various state laws that may require both paid and unpaid leave. Finally, all covered employers should have their current FMLA policies updated to comply with the recently passed National Defense Authorization Act.

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Employees can often collect double or triple damages, costs of litigation, attorneys' fees, and civil and criminal fines.

Second, employers should review and comply with any agreements they have with the employee. While most employees are "at will," some employees have an employment contract or other agreement such as a non-competition/non-solicitation agreement. When planning for a termination, employers should review their obligations pursuant to these contracts and ensure that their actions comply with such agreements. Employers should also inform discharged employees of any ongoing obligations following the termination, such as a continued duty to protect the employers' trade secrets.

Finally, depending on the circumstances, employers should consider offering severance pay in exchange for a release of claims from the employee. In some situations, offering a few weeks' salary for the employee to waive any right to future litigation might save the employer thousands of dollars in litigation costs. Employers should ensure that their release documents are up to date and include any possible claims the employee might have.

In the end, it is impossible to predict the future with respect to litigation arising from an employee's termination. Employers should plan and execute terminations carefully, however, to minimize their risk and exposure to litigation, and to maximize their chances of winning potential claims and lawsuits.

***Patrick O. Peters** *regularly defends employers involved in employment litigation and in administrative hearings before the Equal Employment Opportunity Commission and various state administrative civil rights agencies. For more information about properly terminating an employee, please contact Pat at 216.696.4441 or pop@zrlaw.com.*

Zashin & Rich Co., L.P.A. represents individuals in all facets of domestic relations law and employers in all aspects of workplace law.

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Z & R SHORTS

Upcoming Speaking Engagements

Steve Dlott will present "Defending Workers' Compensation Claims" to the Lake/Geauga Chapter of the Society for Human Resource Management ("SHRM") as part of the "Effective HR – It's All About People!" workshop on June 19, 2008 at the Radisson Hotel/Eastlake. For more information or to register, call (440) 392-2168 or email: info@lgashrm.org.

George Crisci will speak at the 8th Annual Northern Ohio Labor & Employment Law Conference at the Cleveland Metropolitan Bar Association on June 23, 2008. George will present "Public Collective Bargaining Developments" to the conference.

George Crisci and Stephen Zashin will speak at the 45th Annual Midwest Labor and Employment Law Seminar presented by the Ohio State Bar Association October 16 and 17, 2008 in Columbus. George will present "Public Collective Bargaining Developments" to the conference and Stephen will present an update on FMLA and other leave law.

Stephen Zashin admitted to the New York Bar

Stephen Zashin was recently admitted to the New York State Bar and to the bar of the federal district court for the Southern District of New York.

Zashin & Rich Co., L.P.A. represents individuals in all facets of domestic relations law and employers in all aspects of workplace law.