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EMPLOYER LAW BLOG

Why You Can Never Be Too Careful: Terminating an Employee on FMLA Leave

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The short advice, of course, is think twice and carefully before deciding to terminate an employee who is taking or attempting to qualify for FMLA leave.

A recent case from the Seventh Circuit Court of Appeals, *Hansen v. Fincantieri Marine Group, LLC*, addressed some of the perils of administering employee FMLA leave. There, at the request of his employer, the employee obtained a medical certification from his physician for his depression in connection with a request for intermittent FMLA leave. The certification provided that the employee had a medical condition that would cause episodic flare-ups preventing him from performing his job functions. The probable duration of the condition was listed as "months." The physician estimated the frequency of flare-ups as four episodes every six months and the duration of the related incapacity as two to five days.

Over a period of two months, the employee was absent from work on five separate occasions, for a total of eleven days. Specifically, he was absent May 3 through May 6, May 9, May 23, May 31 through June 1, and June 13 through June 15. Given the number of absences, within less than two months, the employee had already exceeded the leave estimated to be needed in a six month period.

When the employee requested additional leave in July, the employer sent a fax to the physician indicating that the July request exceeded the frequency and duration, and requested confirmation of item # 7 on the certification form previously provided. "Item # 7" asks about the employee's need to attend follow up appointments or work part-time or an reduced schedule because of the employee's condition. The Court questioned whether the employer meant to seek confirmation of item # 8 instead of 7, that is, whether the employer meant to seek confirmation of the estimated frequency of episodic flare-ups as well as the duration of the related incapacity. The physician responded with "item #7 confirmed."

Given the physician's apparent confirmation that the employee's requests for leave exceeded the scope of the certification, the employer denied the leave request. After the employee missed several additional days of work within the same month, the employer terminated him for violation of the attendance policy.

Everyone who regularly deals with FMLA leave knows that employees are entitled to a set amount of leave within an applicable 12 month period depending upon which part of the FMLA applies. If an employee exceeds the allotted leave, the employer may terminate the employee pursuant to the applicable attendance policy. Often times, and possibly in this case, there are concerns of FMLA abuses. The easiest examples are cases where FMLA leave is somehow routinely needed on Fridays or Mondays and during holidays.

The employer in the *Hansen* case clearly believed the employee was not entitled to leave. However, while the employee had exceeded the scope of the certification and violated the attendance policy, the Seventh Circuit found that there was question as to whether the employer was justified in terminating the employee. The Court explained that the employer should have requested additional information about the leave needed, especially considering the physician had provided only estimates of the frequency of flare ups.

The lesson of this case in particular, and FMLA analysis in general, is that every case depends on the particular facts at issue. Further, the employer should engage in a dialogue with the employee, and provide the employee sufficient opportunity to provide additional information and modifications to the certification – "say yes or no doctor" faxes will likely rarely suffice.

If you would like more information about this case or a particular FMLA issue you are facing, please contact our Employment Team.

For more information on the Family Medical Leave Act, see our full archive of FMLA blog entries.

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