Louisiana Employment Law Letter

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LAGNIAPPE

ADA and FMLA keep courts busy

A little lagniappe for our faithful readers. The courts have been busy lately addressing labor and employment disputes. Recently, the U.S. Supreme Court and two Louisiana courts weighed in on various provisions of the Americans with Disabilities Act (ADA) and the Family and Medical Leave Act of 1993 (FMLA).

FMLA applies to states

On May 27, 2003, the U.S. Supreme Court issued a decision extending the FMLA to state employers. As you know, the Act entitles an eligible employee to take up to 12 weeks of unpaid leave because of a "serious health condition"; to care for the employee's spouse, child, or parent; or for the birth or adoption of a child. The law allows an employee to sue her employer if it interferes with, restrains, or denies the exercise of her FMLA rights.

While private employers with 50 or more employees have been governed by the FMLA since it was enacted in 1993, courts have concluded that the law doesn't apply to state employers. That has changed.

The Supreme Court has ruled that employees of the state of Nevada (and now all states) may recover money damages if the state violates the FMLA. The Court said that the Act applies to state employers because the law was passed in an effort to remedy gender-based discrimination in the workplace.

Specifically, Congress enacted the FMLA to address the stereotypes that only women are responsible for family caregiving and that men lack domestic responsibilities. Therefore, Congress created the "family care" provision of the FMLA and provided that all eligible employees, regardless of gender, would be entitled to the benefit. Congress sought to ensure that family care leave would no longer be stigmatized as a drain on the workforce caused by female employees and that employers couldn't evade their leave obligations simply by hiring men.

The state of Nevada argued that Congress was responding to a perceived problem in the private workplace and that there was no record of such gender-based perceptions about family

caregivers among public employers. The Supreme Court disagreed, however, and held that subjecting state employers to the FMLA was justified. *Nevada Department of Human Resources v. Hibbs*, 123 S.Ct. 1972 (May 27, 2003); 2003 LEXIS 4272.

ADA retaliation claim stands without discrimination

An employee comes to you and tells you she's having difficulty doing her job because of all the noise and distraction in the office. She tells you she suffers from ADHD (attention deficit hyperactivity disorder). You accommodate her by allowing her to work out of her home, which presumably is free from the noisy distractions of which she complains. You're in the clear, right? Perhaps.

Now let's say you need the employee to resume working in the office and that you provide her a new, quieter workspace. She complains on numerous occasions, however, that she can't function in the office environment. This is more than a hypothetical situation — it really happened to one employer. After her continued complaints, the employee failed to show up for work for several days. Although her husband called in for her and left a message saying she suffered from "severe depression" and that she would be out of work for a few days, the employer fired her.

The employee sued, claiming her employer discriminated against her because she suffered from a disability (ADHD and depression) and retaliated against her when she requested leave as a reasonable accommodation for those disabilities.

Although a federal court in New Orleans concluded the employer didn't discriminate against the employee based on an alleged disability, it also concluded there were enough questions of fact to let the case go to a jury on the issue of whether the employer retaliated against her for requesting a reasonable accommodation.

The moral of this story is that you can be found liable for *retaliating* even if you're not found liable for *discriminating.* You have to be on the lookout to defend yourself against both kinds of claims. Even if you can defeat an employee's claim that you discriminated against her, you're not home free.

What could you do if faced with a similar situation? To begin with, if an employee calls in to say he's suffering from "severe depression," it should trigger your FMLA antenna. Is he eligible for FMLA leave or other company-sponsored leave? And if he isn't eligible for FMLA or other company-sponsored leave, he still may be entitled to a reasonable accommodation, which may include leave, if he suffers from a disability within the meaning of the ADA.

Don't be too quick to pull the trigger on an employee — especially one who has made complaints about a medical condition or requests for an accommodation. Otherwise, you may find yourself in the same situation as the employer in this case. *Bice v. Lennox Industries*, 2003 U.S. Dist. LEXIS 7567 (May 5, 2003).

Employees can waive right to recover money damages under FMLA

How many times have you avoided potential litigation by having an employee sign a release of claims in exchange for monetary consideration over and above her regular entitlement? Most of the time you (thankfully) never hear from her again. Sometimes, however, your former employee will keep the money and sue you anyway. If your release language is carefully drafted, you can prevent this kind of "double dipping," but it can be somewhat tricky.

The U.S. Fifth Circuit Court of Appeals in New Orleans recently decided that a release stating the former employee waived her right to "all other claims arising under any other federal, state or local law or regulation" was a valid release of the employee's FMLA claim. In that case, the employee signed a release in exchange for approximately $4,000. After signing the release, she kept the money but sued her employer anyway, claiming she was fired in retaliation for asserting her rights under the Act.

The regulations interpreting the FMLA state that employees can't waive, nor can employers induce them to waive, their rights under the Act. Therefore, the employee argued, the release couldn't prevent her from suing.

The court disagreed, finding that the regulation prohibits the waiver of prospective FMLA rights but not the postdispute settlement of claims. In other words, an employee can waive any claims she might have at the time she signs the release, but not claims based on future conduct or claims that may arise in the future. The court specifically referenced the fact that waivers are allowed under other employment discrimination laws such as the Age Discrimination in Employment Act and Title VII of the Civil Rights Act of 1964. Accordingly, the court held that a release that purports to waive an employee's right to claim money damages under the FMLA for existing claims is valid.

The purpose of having an employee sign a release is to put disputes to rest before you get to court. The last thing you want in that situation is to end up in court arguing over the validity of the release. It's important to have an attorney review your releases to make sure they're in compliance with ever-changing terms and court interpretations of them. Don't simply "recycle" your releases or use "form" releases. There's no such thing! Each one should be tailored to the situation at hand. As the old saying goes, an ounce of prevention is worth a pound of cure. *Farris v. Williams W.P.C.-1, Inc.*, 2003 U.S. App. LEXIS 10492.

You can find out more about the ADA and FMLA in the subscribers' area of HRhero.com, which is the website for Louisiana Employment Law Letter. You have access to two in-depth HR Special Reports on the subjects: "ADA from A to Z: Everything You Need to Know About the Americans with Disabilities Act" and "FMLA Leave: A Walk Through the Legal Labyrinth." Simply log in and scroll down to the link for all the Special Report titles. If you need help or have lost your password, call customer service at (800) 274-6774.