Mitchell & Sheahan, P.C.

Experience, Integrity, Responsiveness and Commitment

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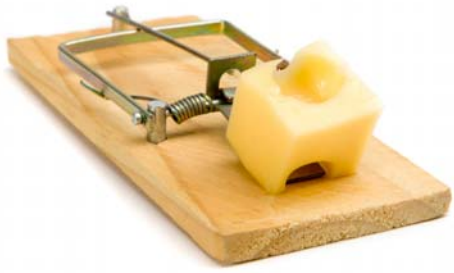
Greetings!

Hello and welcome to the February 2011 edition of the Mitchell & Sheahan monthly newsletter.

This month's newsletter features an article written by Attorney Peg Sheahan titled, FMLA Compliance Is More Complicated Than You Think. The article is about a receptionist who was terminated for absenteeism after about one and one-half months on the job in 2004.

Also included in this month's newsletter is an article written by Attorney Bob Mitchell titled, Age Discrimination Plaintiffs May Have Advantages Under State Law. This article addresses the need for employers to be aware of federal and state age discrimination law differences and how they should take them into account.

We hope you find the articles helpful and informative. As always, if you have any questions about the articles below or have suggestions for future articles, please feel free to contact us.



GOTCHA! FMLA COMPLIANCE IS MORE COMPLICATED THAN YOU THINK

By Peg Sheahan

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An employee absent for over a week sends in a doctor's note saying she is able to work. She nevertheless continues to stay out of work two more weeks. The employer terminates her employment for poor attendance. This couldn't possibly be an FMLA violation, could it? Well, according to a September, 2010 decision of the U.S. Court of Appeals for the Sixth Circuit, the answer is that, yes, this could be an FMLA violation. Branham v. Gannett Satellite Information Network, Inc. , No. 09-6149 (6th Cir. 2010).

Ms. Branham was a receptionist, who was terminated for absenteeism after about one and one-half months on the job in January, 2004. She was rehired in July, 2005 and lasted nearly 1 ½ years until her next absenteeism-related termination in November, 2006.

In her last month on the job in 2006, Ms. Branham called in sick for her child's illness for two days, November 7 and 8, and thereafter continued to be absent for her own illness for two more days, - the remainder of the workweek. She called or emailed each day and the following workday, Monday, November 13, she sent word via her husband that she was still ill and was going to a doctor. On the same day, after the doctor's visit, Ms. Branham reported to her supervisor by phone that the doctor had said she could return to work the following day (Tuesday, November 14) but that she did not feel well and expected to need time off to see additional doctors. Her supervisor advised her to come in to the office and sign a short term disability form (which doubled as an FMLA medical certification form) and mentioned the possibility that she could work from home or after hours to help with some time sensitive work.

Within the next two days, the supervisor faxed an FMLA medical certification form to Ms. Branham's examining doctor. The doctor completed and returned the form on Friday, November 17, stating that Ms. Branham was able to return to work as of November 14. Ms. Branham, however, did not return. Having conferred with her own boss and Human Resources, the supervisor advised Ms. Branham of her doctor's certification and the fact that her job was in jeopardy if she did not return to work promptly. Ms. Brahman responded that a different doctor in the same practice should be consulted for an opinion that she could not work. On Wednesday, November 22, the employer went so far as to send a manager to the medical practice to ask that the doctor review and, if desired, change the November 14 return to work note, and specifically asked that the other doctor Ms. Brahman mentioned be consulted. The practice staff responded that this other doctor could not comment on the note as he had not seen the patient at the visit in question and conveyed that the

originally issuing doctor had reviewed and confirmed the return to work note. Meanwhile Ms. Branham continued absent.

Two days later, on the day after Thanksgiving, Friday, November 24, Ms. Branham was again absent and the company decided to terminate her employment, but was unable to reach her by telephone to inform her. A termination letter was drafted on Monday, November 27 and mailed on Tuesday, November 28, while Ms. Branham continued absent from work. On that Tuesday, Ms. Branham was also informed of her termination in a telephone call. That evening a fax arrived at the employer's office from the same medical practice as the original note's doctor-author. This one was written by a nurse practitioner, who consulted on the same complaints as the original doctor did, migraines, anxiety, depression, and insomnia, and said that Ms. Branham needed further medical attention and could return to work effective January 1, 2007. The employer stood pat and the termination remained effective.

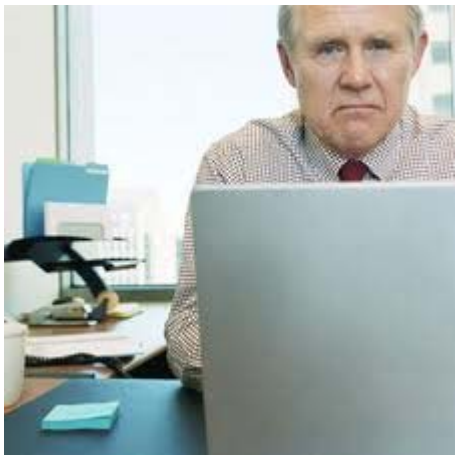
Ms. Branham brought suit claiming the employer had violated FMLA by denying her leave and terminating her employment in retaliation for her having taken leave. The district court relied on the employer's defense that it was entitled to discharge Ms. Branham on the strength of her doctor's note that said she could come to work and dismissed the case. Ms. Branham appealed and the 6th Circuit re-examined the employer's winning argument from the court below and one other, that Ms. Branham had not shown herself to have a "serious health condition" covered by FMLA. This time, Ms. Branham won, avoiding summary judgment and continuing her case to fight another day, proceeding towards trial.

To decide whether there was evidence that Ms. Branham had a serious health condition, the court focused first on the statutory standard of whether she had been incapacitated for three or more days. The fact that Ms. Branham did some work at home during the period did not decide the question, according to the Court of Appeals, because a U.S. Department of Labor ("DOL") Regulation defines "incapacitated" as being unable to perform any one of the job's essential functions, not complete inability to do any portion of the job. Moreover, the at-home work followed a period of three workdays when Branham was unable to perform any work at all, November 9, 10 and 13. The FMLA definition of a serious health condition requires inpatient care or continuing treatment. The 6th Circuit found evidence of "continuing treatment" , defined by a DOL regulation as "treatment two or more times by a health care practitioner" since Ms. Branham saw the examining doctor on November 13 and the nurse

practitioner on November 28. An alternative "continuing treatment" definition in the DOL regulations is a continuing course of treatment flowing from a single health care practitioner's treatment. The Court of Appeals found this standard satisfied because the nurse practitioner's note stated that Ms. Branham required additional visits with multiple practitioners over the ensuing weeks.

Most shockingly in my view, the Sixth Circuit also found the employer could not rely on the examining doctor's note that said the employee could work. Why not? The answer reminds me of the refrain from a childhood game, "You forgot to say, 'Mother, may I?'" Under the DOL regulations, it is the employer's responsibility to provide the employee notice of the need for medical certification in writing. An exception is if the distributed written FMLA policy expressly states that medical certification is required and the employee got a written request for medical certification from the employer within the preceding 6 months. Here, the available evidence (1) showed that the supervisor's request that Ms. Branham provide a certification was oral, (2) did not establish that the employer's written FMLA policy specified that medical certification was required and (3) showed that Ms. Branham had not used leave previously within six months. Furthermore, the Court of Appeals noted that the DOL regulations require that an employee be given at least 15 days to provide a medical certification after the employer demands it, and concluded that since Ms. Branham came up with the nurse practitioner's note on the last day of that time period, she had provided the required support for her leave.

The employer terminated Ms. Branham's employment after she'd been absent for three weeks, two of which followed the date her physician said she should have returned, after sending a manager to her doctor's office to follow her suggestion on how to get a contrary medical opinion only to have the original return to work date confirmed. They communicated with Ms. Branham as much as they could over the course of her absence. I am sure they felt they had exhausted the possibilities of excusing this absence, but they were wrong. I suppose the moral of this story is that American employers who decline to turn their managers and HR people into experts on the complex, arcane and counter-intuitive Department of Labor FMLA regulations do so at their peril.



AGE DISCRIMINATION PLAINTIFFS MAY HAVE ADVANTAGES UNDER STATE LAW

By Robert B. Mitchell

Many employers consider discrimination questions primarily in terms of their federal obligations alone. They often forget to consider State law. While Connecticut courts generally interpret the State's Fair Employment Practices statute in light of federal anti-employment discrimination law, there are areas where significant differences remain between the federal and State laws. In the age discrimination area at least two such points of departure exist that employers should be aware of; the applicability of the federal substantive "but for" standard to liability questions, and the proper measures of damage.

Wherever it applies, a "but for" standard requires the plaintiff to prove that "but for" the defendant's unlawful conduct, the plaintiff's injury would not have occurred. In employment discrimination cases, application of a "but for" standard requires a showing that an adverse employment decision was taken because of an employee's protected class trait. Absent the unlawful motive, there would have been no adverse action and so no harm. By contrast, where a so-called "mixed motive" analysis is applied, once the plaintiff shows that illegal discrimination was a "motivating" or a "substantial" factor in an adverse employment decision, the burden of persuasion shifts to the employer to show that it would have taken the same action against the employee even absent the impermissible consideration. The U.S. Supreme Court applied this "mixed motive" formulation to Title VII (which prohibits race, sex religious, national origin and color based employment discrimination) in the Price Waterhouse v. Hopkins sex discrimination case and found that employer proof that

other factors besides sex discrimination led to the adverse employment action properly resulted in a no liability finding. An issue of continuing discussion after the ruling was the kind of evidence that was necessary to support such an employer defense.

When, Congress enacted the Civil Rights Act of 1991, it reinforced the "mixed motive" theory by legislatively authorizing discrimination findings in Title VII cases when an illegal discriminatory consideration was a "motivating factor" in making an adverse employment decision. (However, the Act limited damages in such mixed motive cases.)

In 2009, the Court's Gross v. FBL Financial Services, Inc., ruling held that the "mixed motive" discrimination theory was not available for federal Age Discrimination claims. It concluded that a "but for" test only was to be applied to ADEA cases. It said that this should be so first, because of differences between Title VII and ADEA language and, second, because the 1991 Civil Rights Act, while addressing the "mixed motive" question under Title VII did not incorporate that standard into the age statute. Since the Gross decision, ADEA plaintiffs have been required to meet that "but for" test to establish liability. The question arises whether the Gross "but for" standard should be applied to age discrimination claims pursued under Connecticut's Fair Employment Practices Act. The answer is likely: No.

Unlike the federal legislative model where two different statutes address age discrimination on the one hand and race, color, sex, national origin and religion discrimination on the other, Connecticut's statutory scheme addresses age in the same statute as other prohibited bases of discrimination. Connecticut's courts have repeatedly recognized the applicability of the "mixed motive" proof formulation in cases arising under our State fair employment practices statute. The same types of differences that exist between the Connecticut and federal discrimination statutory constructs also exist in several other states, including Michigan, Iowa, New York, Texas and Missouri, and courts in these jurisdictions have held that "mixed motive" analysis should be applied in age discrimination cases governed by state law. While the issue has not been addressed by Connecticut's high court, it would seem that the "but for" standard is likely also to be rejected here in favor of continued reliance on the "mixed motive". This presents a far more favorable situation for the age discrimination plaintiff, and a more dangerous problem for the defendant employer, because the threshold for plaintiff proof of age discrimination will be lower under the State statute.

A second point of departure between federal and Connecticut age discrimination law concerns available damages. Connecticut's FEPA provides an administrative process for investigating, conciliating and adjudicating employment discrimination claims. The remedies authorized to be prescribed by the Commission on Human Rights and Opportunities are limited to awarding back pay and benefits and injunctive relief, such as reinstatement or some monetary substitute. The Commission cannot grant compensatory damages, punitive damages or attorneys' fees awards. A complainant who obtains a Commission release of jurisdiction and takes his case to court, however, may seek "such legal and equitable relief which [the court] deems appropriate including, but not limited to, temporary or permanent injunctive relief, attorney's fees and court costs." Included in these potential damages are awards for emotional distress as well as lost wages and other compensatory items. Defendant "willfulness" will allow punitive damages. It is also within the court's discretion to award pre-judgment and post-judgment interest. The Federal ADEA offers a successful age discrimination plaintiff the possibility of a backpay award, injunctive relief, attorneys' fees, liquidated damages of twice the backpay amount upon a finding of "willful" misconduct, and an appropriate interest payment. Compensatory and punitive damages are not permitted; liquidated damages are said to take their place. The Connecticut law's allowance of unlimited compensatory damages, without any "willfulness" requirement may offer a plaintiff able to demonstrate real, substantial harm beyond a loss of wages a higher and sometimes more easily proven prospective award than the more limited federal liquidated damages formula.

Employers should be aware of federal and state age discrimination law differences and should take them into account in managing employment relations situations that can lead to such employee claims. In particular, an employer should be cognizant of the State Law's lower threshold for proving age discrimination and the advantage that this gives the employee plaintiff when compared to the federal rules.

Thank you for reading!

Sincerely,

Mitchell & Sheahan, P.C.

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