

H.R. ALERT *

JULY 2005

THE FAMILY MEDICAL LEAVE ACT (“FMLA”)

The Family and Medical Leave Act (“FMLA”) has garnered a lot of attention from the United States Fifth Circuit Court of Appeals in key areas of “who is covered?” and “what is retaliation under FMLA?” Each of these issues will be addressed in turn.

FMLA Coverage Cases

As most employers know, to be covered under the FMLA, an employer must employ at least 50 employees within 75 miles of the same work site. In *Bellum v. PCE Constructors, Inc.*, 407 F.3d 734 (5th Cir. 2005), the plaintiff argued that his employer was required to give him FMLA leave because it employed 50 employees within a linear radius of 75 miles. However, the driving route between the facilities was not a straight line and measured 88.5 miles. The Court held that if surface transportation was possible between the two facilities, it was the driving distance, i.e., surface miles, that counted, not the linear distance. Based on this fairly narrow interpretation of the FMLA, the Court held that the plaintiff was not a covered employee.

In *Rutland v. Pepper*, 404 F.3d 921 (5th Cir. 2005), a former county deputy clerk sued her employer alleging violation of the FMLA. The Court dismissed the claim holding that the FMLA excludes from coverage the personal staff members of public office holders. Specifically, the FMLA incorporates the personal staff exemption in the Fair Labor Standards Act which excludes individuals “selected by the holder of a public office of a political subdivision to be a member of his or her own personal staff.” 29 U.S.C. § 203(e)(2)(C). The Court analyzed six factors to determine whether a plaintiff

was a member of a defendant’s “personal staff” which included: (1) whether the elected official has plenary powers of appointment and removal; (2) whether the person in the position at issue is personally accountable to only that elected official; (3) whether the person in the position at issue represents the elected official in the eyes of the public; (4) whether the elected official exercises a considerable amount of control over the position; (5) the level of the position within the organization’s chain of command; and, (6) the actual intimacy of the working relationship between the elected official and the person filling the position.

Employer Practice Tip: Some employers neglect to determine whether an employee is even “eligible” to receive FMLA benefits. To be “eligible,” an employee must have been employed by the employer for at least 12 months (not necessarily consecutive months) and have been employed for at least 1,250 hours of service during the 12-month period immediately preceding the commencement of the leave. If your employees do not meet these requirements, they do not qualify for leave under the FMLA. See 29 CFR 825.110. Note, however, an employee might be eligible for some leave other than FMLA, such as military leave, under state law or, under your own leave policies.

Employee Polygraph Protection Act -- Employee Rights

Another federal statute that is garnering more publicity as of late is the Employee Polygraph Protection Act (“EPPA”). This statute generally proscribes

polygraphing testing except in the most limited circumstances. Since there are relatively few cases addressing EPPA, the following case bears noting.

(continued on page 2)

(Department...continued from page 1)

A case that was decided this spring illustrates the importance of understanding what rights are afforded employees under the EPPA. In *Polkey v. Transtecs Corporation*, 404 F.3d 1264 (11th Cir. 2005), the plaintiff sued her employer for violating the EPPA when it requested that she take a polygraph exam at work. The employer was under contract with the Department of Defense to perform mail room services at Pensacola Naval Air Station. When the employer discovered that someone had opened undelivered mail, it requested that all of the mail room workers, including the plaintiff, take a polygraph test. The plaintiff refused the test and was fired one week later, ostensibly for permitting package deliveries through the back door in contravention of the employer's policies. The district court granted summary judgment in favor of the employee, finding that the EPPA states that *simply requesting or suggesting* that an employee take a polygraph exam, absent an applicable exemption,

is a violation. The employer argued that the national defense exemption should apply, but the Court held that this exemption only applies to the federal government, not simply to a defense contractor.

Employer Practice Tip: This case drives home the point that employers should be very wary of ever requiring an employee to undergo a polygraph exam, except under the very few limited circumstances permitted by the Act. EPPA's broad prohibitions have virtually eliminated polygraph exams from the workplace. The U.S. Department of Labor's web site has a synopsis of EPPA and compliance assistance materials such as the required workplace poster. This compliance information can be found on the Internet at this url:

<http://www.dol.gov/esa/whd/polygraph/>

Collective Bargaining Agreement and Arbitration

If you have been through an arbitration, you probably know that the arbitrator's ruling is final and rarely gets reversed by a court due to the limited grounds for judicial review of arbitration awards. Recently, however, the Fifth Circuit did just that. In *Beaird Indus. v. Local 2297, Int'l Union, UAW*, 404 F.3d 942 (5th Cir. 2005), a Shreveport employer decided to subcontract work that had previously been performed by its union employees. The union claimed that by subcontracting the work, the employer violated the collective bargaining agreement (CBA) and brought the dispute to arbitration. In siding with the union, the arbitrator conceded that a provision in the CBA reserved the employer's right to subcontract without any limitations; nevertheless, the arbitrator held that the employer's interest in saving money by subcontracting the work was outweighed by the detrimental effect on the bargaining unit. The employer appealed and obtained a district court order which vacated the arbitrator's award.

On appeal, the Fifth Circuit affirmed the decision in favor of the employer, finding the arbitrator gave his "own brand of industrial justice" and utterly failed to draw his conclusion from the language of the CBA.

Employer Practice Tip: There has been an increase in reported decisions that relate to challenges of arbitration awards, unions, and collective bargaining agreements. With national unions trying to unionize workforces in Louisiana and throughout the Gulf South, employers need to be aware of their rights and obligations under the National Labor Relations Act and train their workforce accordingly. Moreover, with the ever-increasing use of arbitration as a means of resolving disputes, employers need to be mindful that arbitration rulings are not reversal proof.

Proving Retaliation For Exercising FMLA Rights

In another key decision involving FMLA, the Fifth Circuit addressed the issue of retaliation. Retaliation cases are becoming more prevalent as they are often fact-based and involve emotional issues, as the following case illustrates quite clearly.

In *Dutton v. University Healthcare System, L.L.C.*, 2005 WL 1007050 (5th Cir. 2005), the Fifth Circuit dismissed a claim brought by Amanda Dutton who was terminated after she returned from eight weeks of FMLA leave while she underwent removal of a fibroid tumor on her uterus. Dutton's duties included monitoring collections for Tulane University's Hospital and Clinic. While Dutton was out on FMLA-approved leave, Tulane contracted with a company to perform many of Dutton's duties. While Dutton was out on leave, the company discovered that over 1,000 of Dutton's accounts had not been processed.

When Dutton returned from leave, she was counseled about these issues. Two months later, Dutton requested to take leave for another week to remedy complications from her first medical procedure. Dutton was permitted to take this leave, although neither Dutton nor Tulane designated the absences as FMLA leave. When Dutton returned from this leave, it was discovered that she still had over 1,000 accounts that she had not processed and, as a result, she was terminated.

Dutton then sued her employer, alleging that she was retaliated against for taking protected medical leave under the FMLA. She also added a claim that she was "regarded as" disabled by her employer in violation of the Americans with Disabilities Act (ADA). The Court dismissed both claims. Giving little credence to the ADA

claim, the Court said Dutton gave no evidence to show that her employer thought she was disabled. With respect to the FMLA claim, the Court was persuaded by the evidence produced by Tulane, that Dutton's termination was due to her performance, not because she had taken FMLA leave.

Employer Practice Tip: This case is important for two reasons. First, we are often consulted with by clients who want to terminate an employee, but are fearful that because an employee recently took leave under the FMLA, they are "untouchable." This case, along with other cases we have profiled in previous *HR Alerts*, makes clear that the courts will look to the reason behind the employment decision in determining whether there was a violation of the employee's statutory rights. The mere fact that there is a close proximity between the exercising of a federal right, and an adverse employment decision, does not automatically mean an employee will prevail on a retaliation claim. That said, it is important for an employer to document the legitimate business reasons for the employment decision in the event a claim proceeds to litigation.

The second reason this case is noteworthy is to point out that many plaintiffs take the "kitchen sink" approach to litigation, adding as many claims as they can, in the hope that one will stick. Here, Dutton added an ADA claim, despite having no evidence either that she was disabled or regarded as disabled. Although she was unsuccessful on that claim, it serves as an important reminder that employers need to consider all possible claims when making employment decisions as you never know what claim will show up in court down the road!

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Inquiries concerning topics addressed in the *H.R. Alert* may be directed to Nan Alessandra, Jane Armstrong, Kim Boyle, or David Korn. Your comments, questions, and suggestions are encouraged.

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MARK YOUR CALENDARS

New Orleans Employment Law Annual Seminar

Thursday, November 10, 2005
Wyndham Canal Place

We will have a guest speaker from the EEOC on recent EEO developments. We will also have a leading practitioner in computer forensics address recent trends in employment litigation on "smoking guns" in employer e-mails and computer hard drives and the complex discovery and trial issues surrounding the need to preserve electronic evidence and the consequences of the failure to do so.

For more information, please contact:
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