

H.R. ALERT*

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Two key decisions were recently rendered by federal courts affecting employers under the Family and Medical Leave Act and the Americans With Disabilities Act. Each will be addressed in turn.

Briones v. Genuine Parts Co., 2002 WL 31086089 (E.D. La. 2002).

Does FMLA Cover Staying at Home with Healthy Children while a Sick Sibling is in the Hospital?

In *Briones*, the plaintiff began working at defendant's distribution center making deliveries and working as a warehouseman in May, 1999. Approximately a year later, plaintiff's 16 month old son became gravely ill and required hospitalization. Because the plaintiff's wife was required to stay with the ill child at the hospital, the plaintiff decided to stay home with his three other children -- all of whom were healthy.

Pursuant to the defendant's policy, the plaintiff called his supervisor prior to each day he missed work. After failing to come to work twice in a row, his supervisor called and asked to speak with the plaintiff, but was told he (plaintiff) was not at home. According to the defendant, however, at that same time, plaintiff called in to work claiming to be at home. Later that day, plaintiff alleged he called again and specifically requested FMLA leave. When the plaintiff reported to work the next day, he was terminated for allegedly violating the employer's honesty policy. According to defendant, the plaintiff was not at home caring for his children as he claimed and therefore was terminated for dishonesty.

Moving for dismissal of the plaintiff's claims, defendant argued that plaintiff was not entitled to stay home to babysit his three healthy children because that was not an FMLA-qualifying event. Moreover, defendant claimed that he was terminated for a legitimate reason, *i.e.*, dishonesty. According to plaintiff, he was entitled to FMLA leave because of the

serious health condition of his ill child. Plaintiff argued that while he did babysit his healthy children at night (when he would have otherwise been working), he visited with his ill child in the hospital during the day (when he would have otherwise been sleeping). Because he was visiting his child during the day, he needed the night time to sleep and the fact that his three other children were with him at home while he was there was immaterial.

In analyzing the plaintiff's claim, the district court acknowledged the numerous courts that hold absences to care for a child who doesn't have a serious health condition are not considered FMLA-qualifying absences. The court noted, however, that characterizing the plaintiff's claim in the instant case as a request to "babysit" was too narrow. The court determined that the employee clearly would have been entitled to FMLA leave in order to care for his ill child — despite the fact that the plaintiff admitted he didn't visit the child during a time when he would normally have been working. With respect to the defendant's claim that plaintiff was terminated for dishonesty, the court noted that such was a credibility determination that could best be determined at trial.

Note: The case is now on appeal at the U.S. Fifth Circuit Court of Appeals. We will closely monitor this case and keep our readers abreast of all developments.

Blanks v. Southwestern Bell Communications, Inc. (5th Cir. 2002).

Fifth Circuit Upholds Dismissal of ADA Claim Based on HIV Infection

In an opinion handed down just this month, the United States Court of Appeals for the Fifth Circuit made it clear that infection with the Human Immunodeficiency Virus ("HIV") that leads to Acquired Immunodeficiency Syndrome ("AIDS") is not enough, in and of itself, to make a person disabled under the Americans with Disabilities Act ("ADA"). *Blanks v. Southwestern Bell Communications, Inc.* (5th Cir.

2002). The court held that the HIV positive employee in the case was not substantially limited in the major life activity of working, and as a result, could not be considered disabled.

In *Blanks*, the plaintiff was employed as a customer service representative ("CSR") with a phone company. In 1996, Blanks took short-term disability leave for depression and

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work-related stress. While on leave, he was diagnosed with HIV and sought treatment for his disease. Blanks received a medical release to return to work, but his doctor recommended he not work as a CSR because dealing with belligerent customers had contributed to his depression. His employer denied Blanks request for a particular position, but offered him several other positions. Blanks accepted a position at a salary of \$100 less per week, but resigned two weeks later, citing the pay cut as the reason. Blanks subsequently filed a lawsuit in the Northern District of Texas, claiming constructive discharge and violations of the ADA. The court granted summary judgment in favor of the employer and Blanks appealed the decision to the Fifth Circuit.

To establish a case of discrimination under the ADA, a

plaintiff must be a qualified individual with a disability. A disability is defined as “a physical impairment that substantially limits one or more of the major life activities of such individual.” In upholding the dismissal of the plaintiff’s ADA claim, the Fifth Circuit acknowledged that they considered Blanks physically impaired by his HIV status, but noted that he failed to show how this impaired any of his major life activities, specifically the major life activity of working. The court held that Blanks had to show he was significantly restricted in the ability to perform either a class of jobs or a broad range of jobs in various classes as compared to the average person having comparable training, skills and abilities. While an individual need not be completely unable to work, one is not substantially limited in working if he or she is unable to perform a single job or a narrow range of jobs.

The court found that Blanks was able to perform a wide range of jobs, and his HIV status only substantially affected his ability to perform his form position in customer service. Since his physical impairment only precluded him from performing a single job, the court held that Blanks could not be considered disabled under the ADA. In a more narrow finding, the court held he was not substantially limited in the major life activity of reproduction, because he had no intention of having additional children and his wife was unable to become pregnant. Because he was not considered as disabled under the ADA, the court did not address whether the employer had offered reasonable accommodation under the ADA.

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