PLUNKETT COONEY

A Small Employer's Big Mistake Nearly Results in FMLA Liability

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A significant ruling by the U.S. Court of Appeals for the Sixth Circuit recently helped an employer with less than 15 employees narrowly avoid liability under the Family and Medical Leave Act (FMLA).

In *Dobrowski v. Jay Dee Contractors, Inc*., the U.S. Court of Appeals for the Sixth Circuit was asked to decide whether Dobrowski had rights under FMLA although his employer did not employ a sufficient number of employees to trigger FMLA obligations.

The plaintiff argued that "notwithstanding his admitted ineligibility for the Act's protections, [his employer] should be estopped from now denying his eligibility because [it] represented, prior to his taking leave, that he was eligible."

Estoppel is an equitable principle that, in the right circumstances, allows courts to provide relief out of fairness, when a party would not otherwise be entitled to prevail. Generally, estoppel will require the plaintiff to show:

- Conduct or language by the defendant amounting to a representation of fact
- Unawareness of the true facts by the plaintiff
- Detrimental and justifiable reliance on the representation by the plaintiff

Some courts also require the plaintiff to prove that the defendant knew the true facts when it made the misrepresentation, and that it intended the plaintiff to rely and act on its representation, but the Sixth Circuit declined to do so.

Applying this theory to the FMLA claim, the plaintiff was unable prove the last element - that he justifiably relied on the grant of FMLA leave to his detriment because there was no evidence that the plaintiff would not have scheduled the surgery had his employer not granted him a FMLA leave of absence.

Key to the court's ruling was that the plaintiff had scheduled the surgery *before* he requested FMLA leave. Therefore, he did not show that "his decision to have the surgery was contingent on his understanding of his FMLA status…" Had such proof existed, the employer may then have been liable for terminating the plaintiff after he had taken his leave even though the plaintiff had no right to leave under the Act.

Don't make the same mistake! If your company employs fewer than 50 employees, do not provide FMLA leave rights in your employee handbook, without a disclaimer that the policy is only effective *if* the company employs 50 or more employees, and do not "approve" leaves of absences under the Act. Also, employers subject to FMLA need to ensure that their policies and practices include the significant changes required under the new regulations to avoid liability.

If you have any questions about your FMLA policy, contact your Plunkett Cooney attorney or the author. Inquiries regarding the impact of this decision may also be directed to the firm's Labor & Employment Law Practice Group Leader, Theresa Smith Lloyd at (248) 901-4005; tlloyd@plunkettcooney.com.

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