

HIRE Institute
1320 Nineteenth Street, N.W., Suite 300
Washington, DC 20036
Tel: 202-296-4516
Fax: 202-296-8205
hireinst@aol.com

“Employee Briefs”
October 2008

FMLA

The Seventh Circuit held in Peters v Gilead Sciences, Inc. that written communications with employees can impose obligations on employers in excess of the requirements of the FMLA. The FMLA covers employers under a “50/75” rule. Under that rule employers do not have to provide FMLA leave to employees who work at sites with fewer than 50 employees, if the total number of employees working within 75 miles of that site for the same employer does not exceed 50. In this case, the employee worked at a site that employed less than 50 employees and there was no other site within 75 miles. Therefore, employees at that site were not covered by FMLA leave requirements. However, the employer distributed to all employees at all of its locations, many of whom at other sites were covered by FMLA because more than 50 employees were employed at those sites, an employee booklet that advised that all of the employer’s employees were covered by FMLA. When the plaintiff in this case went on leave, he received a form letter explaining that all employees were covered by FMLA. The employee was denied FMLA leave when he returned to work, refused to accept a different position and was terminated. The employee sued claiming that the employer had violated the FMLA. The court held that while the employee was not covered by the protections of FMLA, the employee manual and form letter created a right under state law equivalent to FMLA and the employee reasonably relied on the employer’s representations. This is a case where what an employer says in writing can, and usually will, bind the employer.

The Seventh Circuit held in Vail v Raybestos Products Company that an employer does not violate the FMLA if it refuses to reinstate an employee based on “an honest suspicion” that the employee is abusing her leave. In this case, the company had an honest suspicion that while on intermittent FMLA leave the employee was working for a family lawn service business and discharged her. The employer had granted 33 days of intermittent FMLA leave when the employee called in sick at the last minute because of migraine headaches. An off duty police officer retained by the employer observed the employee while on one of her FMLA leave days cutting grass at a cemetery serviced by her family business. The court held that to make out a case of violation of FMLA the employee must be able to show: (1) she was an eligible employee; (2) she took leave for “the intended purpose of the leave” and (3) the employer denied benefits as a result of the leave. In this case the court held that the employee did not take leave for the intended purpose.

ADA and ERISA

The Tenth Circuit in Trujillo v Pacicorp held that the employer violated both ADA and ERISA when it discharged a husband and wife who had worked for the employer. In this case, the husband and wife and dependent son were covered by a self-funded medical insurance plan provided by the employer. The son developed a brain tumor that later metastasized to his spine. In May 2003, he suffered a relapse. His doctors recommended experimental treatment which was unsuccessful and the son died in 2004. Six months of the experimental treatment cost \$62,000. In June 2003, 11 days after the son’s relapse, the husband and wife were terminated for intentionally falsifying time records. The employees sued claiming that their discharges were violations of ADA and ERISA. The court noted that one of the provisions of ADA prohibits denial of benefits to a qualified individual because of a known disability of an individual with whom the qualified individual is known to have a relationship or association. The court also noted that ERISA prohibits the termination of an individual for the purpose of preventing that person

from obtaining a benefit to which that person is entitled. The burden is on the employee to prove by a preponderance of the evidence that the discharge was motivated by an intent to interfere with employee benefits protected by ERISA. The court, in deciding that the discharges were in violation of ADA and ERISA, relied on statements made by the employer expressing concern about the cost of the son's treatment and by the proximity in days between the relapse and the termination and the evidence that other employees were not discharged because of similar minor discrepancies in the time records. The Eighth Circuit held in Tjernagel v Gates Corp that the employer did not violate the ADA by discharging an employee whose disability prevented her from working the mandatory overtime required of all other employees in all job classifications. The court reasoned that in this company, mandatory overtime required of all employees over prolonged periods of time is an essential function of the job. Because all employees in all job classifications worked mandatory overtime, there was no accommodation that the employer could offer that would allow the employee to perform this essential function.

Union Organizers

The Second Circuit in Salmon Run Shopping Center LLC v NLRB refused to enforce a decision by the NLRB requiring a private shopping mall to allow non-employee union organizers to distribute circulars to shoppers critical of the use by one of the stores in the mall of a nonunion contractor to do renovations. The mall allowed charities to distribute circulars which resulted in enhancement of the mall's status in the community, but did not allow distribution of political literature. There was no evidence that the mall had previously allowed the distribution by anyone of circulars in the mall's common areas promoting or criticizing any of the mall's tenants. The court concluded that absent any evidence of discrimination, the mall could bar non-employee union organizers from distributing circulars. Several circuit courts disagree on the standards to be used in such cases and this issue may well wind up with the U. S. Supreme Court.

Accommodation

The Second Circuit in Brady v Wal-Mart Stores, Inc. held that even if an employee with an obvious disability does not request an accommodation, the employer is obligated to engage in "interactive dialogue" with the employee in order to provide a reasonable accommodation. In this case, an applicant with cerebral palsy, who walked with a shuffle and a limp, spoke slowly, had poor vision and a poor sense of direction, applied for a job. The applicant stated on his application that he did not need accommodation and without accommodation, could perform the essential functions of the open job in the pharmacy department. After the employee was hired, his supervisor became dissatisfied with his job performance and transferred him to round up carts in the parking lot and then to the food department. The employee quit and filed a lawsuit alleging that he was discriminated against in violation of the ADA on the basis of his disability because the employer failed to supply him with a reasonable accommodation. A jury found in favor of the employee. The employer filed a motion for judgment as a matter of law. The trial judge denied the motion. The employer appealed the denial of the motion. The Second Circuit upheld the trial judge's decision and the decision of the jury. Thus, if an employee's disability is observable, whether or not the employee requests it, the employer is obligated to discuss with the employee a reasonable accommodation for the disability.

Settlements and Awards

The EEOC settled two consolidated class action lawsuits against pharmaceutical giant Walgreen Company for \$24.4 million. The class consisted of 10,000 current and former African-American employees whom the EEOC alleged were denied promotional opportunities and were assigned to work only in stores in certain neighborhoods. The settlement includes \$5.59 million in attorney fees.

The EEOC settled a lawsuit filed on the basis of age and racial discrimination against Conective E.D. PA for \$1.65 million. The EEOC alleged that the defendants knew of, and had permitted, racial harassment

by white managers and co-workers to 70 black employees out of an otherwise white workforce of 900 in the form of graffiti, offensive epithets and a hangman's noose.

The EEOC settled a lawsuit for \$625,000 against the Specialty Rests, Inc. company, a California chain, based on sexual harassment consisting of offensive touching and indecent comments by managers and co-workers. The EEOC also alleged retaliation against the female workers after they filed complaints.

The EEOC settled a lawsuit for \$972,000 filed against the New York State Department of Corrections filed on behalf of 22 employees on the basis of pregnancy discrimination. The state agency removed these employees from workers' compensation and placed them on maternity leave, which provided much lower benefits after a child is born.

Supremes

The Court, by a 5 to 4 margin, decided that granting additional years of service for pension purposes to employees who become disabled in order to vest them and not granting the same credit to employees who were already vested when they became disabled is not age discrimination. Kentucky Retirement System v EEOC.

“Employee Briefs” is provided free-of-charge to United Insurance Company Limited insureds and endorsing associations. Reproduction without expressed written permission of the HIRE Institute is strictly prohibited.

“Employee Briefs” is written by Malcolm L. Pritzker, Esq., Attorney-at-Law, Washington, DC. Any questions concerning content should be addressed to the HIRE Institute, 1320 Nineteenth Street, N.W., Suite, 300, Washington, DC 20036, tel: 202-296-4516, fax: 202-296-8205, e-mail: hireinst@aol.com.