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MONDAY, SEPTEMBER 22, 2014

Chicago Daily Law Bulletin®

Volume 160, No. 186

7th Circuit sides with employee in dispute over intermittent absences

The Family and Medical Leave Act entitles eligible employees up to 12 weeks of leave during any 12-month period. It covers, among other conditions, "serious health conditions" that are chronic and cause episodic incapacities. Therefore, eligible employees can take intermittent FMLA leave — i.e., single days of leave and even partial day absences — as opposed to 12 consecutive weeks of leave.

In *Hansen v. Fincantieri Marine Group LLC*, No. 13-3391 (7th Cir. Aug. 18, 2014), the 7th U.S. Circuit Court of Appeals held that employees requesting intermittent FMLA leave are not required to present expert medical testimony to prove that they suffered an "incapacity."

The court further rejected a bright-line rule that would allow employers to discharge an employee solely on the basis that the frequency and duration of an employee's absences were not consistent with an "estimate" previously provided by the employee's physician.

In *Hansen*, the plaintiff was employed by Marinette Marine Corp. and its parent company, Fincantieri Marine Group LLC (FMG). FMG has an attendance policy under which employees accumulate points for unexcused absences from work. Employees incur one point any time they miss more than four hours of a scheduled work day.

Individual points expire one year after they are incurred. When an employee accumulates 10 points, he or she is subject to discharge. FMLA-qualifying absences are not counted as missed days under the attendance policy. FMG outsources the administration of its attendance policy and FMLA leaves to a third-party administrator.

On May 2, 2011, the plaintiff had nine attendance points. On May 3, he requested FMLA leave for his serious health condition — depression. He was absent from work on May 3 through 6 and May 9.

On May 11, the plaintiff's physician submitted a medical certification to FMG which stated the following: Plaintiff had a condition that would cause episodic flare-ups periodically preventing him from performing job functions; his condition (depression) began in October 2010 and was exacerbated on May 3, 2011; the probable duration of plaintiff's condition was "months"; the frequency of plaintiff's flare-ups of depression could be four episodes every six months; and the episodes could last from two to five days.

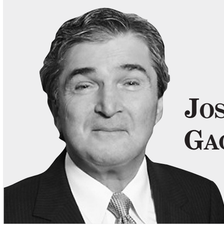
Based on the medical certification submitted by the physician, FMG and/or the third-party administrator approved the plaintiff's FMLA leave (and did not charge him with any attendance points) for May 3 through 6, May 11, May 23, May 31 to June 1, June 13 through 15, June 22 and June 27.

On July 1, after allegedly experiencing his eighth flare-up related to his depression, the plaintiff requested FMLA leave for that day. On July 6, the third-party administrator sent a fax to the plaintiff's physician asking him to confirm that the plaintiff's July 1 absence was "out of his frequency and duration" previously identified by the physician.

The administrator presumably contacted the physician because the plaintiff had allegedly suffered his eighth bout of depression in four months, whereas the physician previously estimated that the plaintiff could have up to four episodes every six months.

The physician confirmed the administrator's question.

LIFE IN THE WORKPLACE



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However, in the fax sent to the physician, the administrator identified the incorrect box for the physician to review. Therefore, the physician did not analyze the key issue, i.e., whether he was going to modify the frequency and duration of the plaintiff's depression episodes.

The third-party administrator denied the plaintiff's request for FMLA leave on July 1 (his eighth episode), July 11 through 13 (his ninth episode) and July 18 (his 10th episode). As a result of these unexcused absences, the plaintiff surpassed 10 attendance points.

On July 22, FMG terminated the plaintiff's employment. FMG explained to the plaintiff that he "exceeded his frequency" under which he could "miss four times every six months" and that the third-party administrator "called your doctor and there was no change in your certification."

On July 26, the plaintiff's physician sent a letter to FMG and the third-party administrator, stating that he was amending his original certification. The physician increased the period of the plaintiff's incapacity to cover all of 2011 and also increased the frequency of the plaintiff's depression episodes to one episode per month, for a duration of two to five days per episode.

Despite this new information provided by the physician, FMG did not rescind its termination of the plaintiff's employment.

The plaintiff filed suit against FMG, alleging claims of interference and retaliation under the FMLA. The U.S. District Court granted summary judgment for FMG, holding that the plaintiff was required to provide expert medical testimony to prove that his serious health condition rendered him unable to perform the essential functions of his position on the days he sought FMLA leave.

On appeal, the 7th Circuit reversed the district court's decision. The first issue decided by the court was whether an employee is required to present expert testimony at trial to prove that he was incapacitated for each day on which he requested FMLA leave. The court held that FMLA plaintiffs can prove that they missed work due to a covered "incapacity" by presenting lay testimony and are not required to present expert medical testimony.

In support of its holding, the court cited the law from other federal appellate circuits. Some circuits, the court noted, have held that lay testimony combined with medical testimony raises a genuine issue of material fact as to whether a plaintiff suffered a covered "incapacity."

The court added that other federal appellate circuits have "gone further and have held that lay testimony alone is sufficient to create a genuine issue as to incapacity; expert testimony is not required."

The court also cited the FMLA regulations, which "anticipate that the determination whether an employee is unable to work due to a serious health condition would not necessarily be made by a medical professional."

The court further stated that certain chronic "serious health conditions" can qualify for FMLA leave even though the employee is not treated by a health-care provider during the absence, such as an individual who suffers an asthma attack or a pregnant employee who misses work due to severe morning sickness: "In neither example would the employee necessarily seek treatment from a health-care provider."

Applying its holding to the facts presented, the court held that the plaintiff, by presenting medical documentation — i.e., his medical certification — from his physician on the question of incapacity, presented enough evidence that he suffered an "incapacity" on the days his FMLA requests were denied to survive summary judgment.

The court then analyzed the issue of whether an employer can deny intermittent FMLA leave when an eligible employee exceeds the estimated length or duration provided in a medical certification.

The court held that estimates in medical certifications do not act as limitations on the frequency and duration of episodes for which an employee may be entitled to intermittent FMLA leave.

Therefore, it was improper for FMG to discharge the plaintiff simply because his requested intermittent leave exceeded the estimates identified by his physician. The court stressed the fact that the physician's original conclusions were, in fact, estimates.

The court noted that FMG could have requested a second medical opinion after receiving the physician's original certification. Additionally, FMG could have sought recertification after the plaintiff's absences exceeded the frequency and duration of the depression flare-ups previously identified by his physician. Both of these measures would have been compliant with the FMLA.