

FEBRUARY 20, 2017

EMPLOYER'S "HONEST BELIEF" DEFENSE REMAINS VIABLE IN CASES OF EMPLOYEE MISUSE OF FMLA LEAVE

Too often employers have reservations or concerns about employees' misuse of FMLA leave and fail to act in response. A recent holding in a federal court case serves as a reminder to employers that if they have an "honest belief" that employee FMLA misuse has occurred, they may have a certain defense to retaliation claims following an employee's discharge for misuse of leave.

EMPLOYERS HAVING AN HONEST BELIEF THAT EMPLOYEES ARE MISUSING FMLA LEAVE SHOULD NOT REFRAIN FROM HOLDING EMPLOYEES ACCOUNTABLE

A federal court recently held that an employer's honest belief regarding employees' misuse of FMLA leave, which led to termination, will not serve as a basis for a FMLA retaliation claim. The plaintiff was a machine operator whose basis for FMLA leave was certified, and then continuously recertified, every six months for intermittent FMLA leave following hip replacement.

After leaving a local pub, the plaintiff was arrested for DUI. After being released from jail the next morning, the plaintiff notified his employer that he would be taking FMLA leave due to leg pain. Several months later, the plaintiff pled guilty to the DUI charge and served 72 hours in jail immediately following the hearing. The following year, the employer discovered in a company mailbox a newspaper article reporting plaintiff's conviction and sentencing. The employer then obtained a copy of the criminal court docket and noticed that plaintiff's arrest date and court dates appeared to coincide with days on which he took FMLA leave. The plaintiff was terminated for violating the employer's dishonest acts policy.

In response, the plaintiff sued, alleging FMLA retaliation and interference (and also for violation of the ADA). The plaintiff argued that the employer was mistaken in its belief that he misused his FMLA leave or was otherwise dishonest with regard to the leave taken. In finding an absence of any retaliatory intent, the court noted that the plaintiff was continuously recertified over the years, his requests for use were not denied, he was not prohibited from returning to work after taking his approved FMLA leave, he continued to take leave without issue and there was no indication of any "animus" by the employer toward the employee. Ultimately, the court found that the employer's evidence, together with its "honest belief" that plaintiff was misusing FMLA leave, constituted a legitimate nondiscriminatory reason for the termination.

LESSONS FOR EMPLOYERS

Employers should have policies that specify that discipline, up to and including termination, may result from submitting false documentation or from fraudulently using leave time. Employers should also first attempt to obtain some evidence of misuse before holding employees accountable. Once obtained, employers should not be afraid to hold employees accountable for policy violations, even if employees are, or have previously, engaged in protected activity. So long as an employer has an honest belief (even if incorrect or mistaken) that employees have misused FMLA leave, termination of employment will not support a FMLA retaliation claim. Finally, employers may also consider waiting until employees complete authorized FMLA leaves so as to potentially avoid a FMLA interference claim.

The court rendering this decision has jurisdiction over Delaware, New Jersey, Pennsylvania and the U.S. Virgin Islands. Because the court referenced and relied on decisions from other courts that have jurisdiction over Illinois, Indiana and Wisconsin, Arkansas, Iowa, Minnesota, Missouri, Nebraska, North Dakota and South Dakota, Colorado, Kansas, Oklahoma, New Mexico, Utah and Wyoming, employers in these states are also the beneficiary of this decision. However, employers in Michigan, Ohio, Kentucky and Tennessee should note that courts having jurisdiction over these states adopt a modified version of the honest belief rule requiring employers to show that their belief is not only honest but also is "reasonably based on particularized facts."

If you have any questions, please contact Larry Jensen at ljensen@hallrender.com or (248) 457-7850 or your regular Hall Render attorney.

Reference: *Capps v. Mondelez Global*, No. 15-3839 (3rd Cir., Jan. 30, 2017).