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A Case Study: How Not to Respond to an Employee's Intermittent Leave

A federal court in the Southern District of Ohio recently provided employers its perspective—through the multiple mistakes it identified by the defendant, Cherryhill Management, Inc.—on how not to treat an employee who takes intermittent leave of absence under the Family and Medical Leave Act ("FMLA"). The two plaintiffs, Brittany Clark and Robert Sammons, were employees with serious medical conditions. Both were approved for intermittent FMLA leave. Nevertheless, after each missed two days of work, the company summarily terminated the employment of each of them. The reason: they violated the company's two day "no-call, no-show" provision in its attendance policy. The aftermath: the two employees sued the company, and judgment was entered against Cherryhill for interfering with the FMLA rights of both employees.

A closer look at the circumstances involved in each employee's absences is necessary to understand what the court identified as the employer's errors. Sammons was diagnosed with his FMLA-qualifying condition on August 16, 2016. He submitted the necessary FMLA paperwork certifying his need for intermittent leave, and it was accepted by the company. On September 28, 2016, he left work after telling the company, "I'm having a panic, anxiety attack, and I got to take my FMLA, and I'm going to try to go see a doctor." He received a doctor's note excusing him from work the next two days, but before he could present it to the company, he was fired on September 30 for violating the company's two day no-call, no-show policy. The court sardonically observed that "somehow Cherryhill was no longer aware of his situation the next two days" after he expressly stated on September 28 that he was leaving to see a doctor because of his condition.

Clark also suffered from a serious health condition for which she requested FMLA leave from June 13, 2016 through June 27, 2016. Cherryhill accepted her FMLA leave forms from Clark's doctor, which also certified her need for intermittent leave beyond June 27, 2016. When Clark's initial FMLA leave for a definite period of time ended on June 27, she did not report to work on June 28-29. Consequently, her employment was terminated on June 30 for violation of the same no-call, no-show rule.

In ruling in favor of the terminated employees, the court found that the company had made several mistakes, which ran afoul of the requirements of the FMLA and the regulations and court decisions implementing and interpreting it. Before listing the mistakes the court identified, it is important to note that this is a district court decision that may be appealed by the parties. In addition, it does not set a legal precedent for employers, particularly those outside of the Southern District of Ohio. Nonetheless, the list, which follows, provides insights as to the requirements some courts may place on employers: (1) Cherryhill never gave either employee written notice of the need for additional medical certification for the two days they were absent without calling in; (2) it didn't give the employees the required 15-day time period to produce additional medical certification before terminating their employment; (3) the company did not provide either employee with written notice of the consequences for failing to timely provide sufficient medical certification; (4) the company wrongly believed that its no-call, no-show rule imposed a higher duty on each employee to give notice of absence than the FMLA required; and (5) most important, the company made no inquiry of the employees as to why they were absent on the two days in question although it knew that each of them had been absent because of their serious health conditions on the days immediately before their alleged two day no-call, no-show violations. Citing precedent from the Sixth Circuit Court of Appeals—and this is the biggest takeaway for employers—the court stated that "***once an employee gives notice that they are [sic] taking FMLA leave, the burden shifts to the employer to inquire of the employee whether they are [sic] still taking FMLA leave."***

It remains to be seen whether the employer will appeal this decision and, if an appeal is filed, whether the Sixth Circuit (which covers Ohio, Kentucky, Michigan and Tennessee) will uphold the ruling of the district court. One question that was not answered by the court is how this decision squares with the various provisions in the FMLA regulations that allow employers to enforce their "usual and customary notice and procedural requirements [including call in requirements], absent unusual circumstances." Regardless, before terminating any employee for absenteeism, cautious employers should review the five items above to insure they don't make costly mistakes. Employers may find it beneficial to call counsel to discuss the specific circumstances and the reason for the termination before pulling the trigger.

For more information, contact Wayne "Skip" Adams or another member of our Labor, Employment and Immigration Group.