



ROBINSON & COLE LLP

Labor, Employment & Benefits



Request for Time Off to Care for Son with ADHD May Be Protected by FMLA

Ola Jennings, an employee of Parade Publications, sought leave or a modified work schedule under the Family and Medical Leave Act to care for her son, who had Attention Deficit and Hyperactivity Disorder. Parade told her ADHD was not covered by the FMLA and denied her request for FMLA leave. Parade also denied her request for a modified work schedule. Jennings filed a lawsuit claiming that Parade's denial of her requests for a leave of absence and modified work schedule violated the FMLA. Parade defended its actions on the basis that Jennings failed to provide it with adequate notice that Jennings' son had a serious medical condition within the meaning of the FMLA, claiming that Jennings simply requested time off for babysitting. In [Jennings v. Parade Publications](#) (9/30/03) the U.S. District Court for New York ruled that Jennings' statement that her son had ADHD and that she wanted FMLA leave was sufficient to trigger Parade's obligation to request additional information regarding the claimed need for FMLA. The court, however, denied the motions for summary judgment filed by both sides, on the grounds that there were factual issues to be resolved before it could determine whether Parade violated the FMLA.

ADHD Is Not a Disability Under the ADA

James Whitlock sued his employer, Mac-Gray, Inc., claiming that Mac-Gray discriminated against him in violation of the Americans with Disabilities Act. He based this claim on the fact that he had been diagnosed with Attention Deficit and Hyperactivity Disorder. In [Whitlock v. Mac-Gray, Inc.](#) (10/6/03), the U.S. Court of Appeals for the First Circuit ruled that Whitlock was not disabled for purposes of the ADA because his ADHD did not render him incapable of performing his job, nor did it substantially limit his ability to perform a class or broad range of comparable jobs. The court also ruled that Whitlock failed to prove that Mac-Gray regarded him as disabled since he failed to prove that Mac-Gray perceived him as being precluded from more than a particular job.

Employee Who Engaged in Fraud Did Not Forfeit His Right to Termination Benefits

When Latex Foam International Holdings terminated Jonathan May's employment without just cause, it paid May a monthly "termination benefit" in accordance with the employment agreement executed when May was hired. After making three payments to May, Latex Foam discovered that May forged the signatures on two of Latex Foam's mortgage applications, and thus, it stopped making payments to May. May filed a lawsuit for breach of contract and thereafter a panel of arbitrators concluded that May was entitled to his termination benefits. Latex asked the trial court to vacate the arbitrators' award on the grounds that it violated the public policy against forgery. In [Latex Foam International Holdings v. May](#) (9/8/03), the Connecticut Superior Court ruled that, although there is a public policy against forgery and fraud, because May's criminal conduct did not lead to his termination, he was still entitled to receive his termination benefits.

Affirmative Action Plan Constitutes Direct Evidence of Unlawful Discrimination

Xerox Corporation implemented a Balanced Workforce Initiative for the purpose of insuring that all racial and gender groups were proportionately represented at all levels of the company. Pursuant to the workforce initiative, Xerox generated reports with explicit racial goals for each job and grade levels. Based on these reports, Xerox determined that African-Americans were over-represented in its Houston office. Several African-American employees filed a lawsuit against Xerox claiming race discrimination in violation of Title VII, relying in part on these reports. The employees claimed that they were denied promotions and pay increases and were forced to work in a racially hostile environment. In [Frank v. Xerox Corporation](#) (9/30/03) the U.S. Court of Appeals for the Fifth Circuit ruled that Xerox's workforce initiative and the reports generated as a result constituted direct evidence from which a jury could conclude that Xerox inappropriately made employment decisions on the basis of race, which limited the employment opportunities of its African-American employees. The reports did not, however, constitute evidence that Xerox created a hostile work environment.

FMLA Trumps Employer's Stricter Internal Attendance and Leave Policies

Pursuant to Honda's absence policy, employees must formally request a leave from the Administration-Leave Coordination Department. If the leave is foreseeable, the request must be made at least 30 days, or as soon as practicable, before the leave is to begin. If the leave is not foreseeable, the employee must request the leave within 3 consecutive workdays of the first day missed. Samuel Cavin, a Honda employee, asked for FMLA leave but because he failed to comply with Honda's absence policy, Honda denied his request. In [Cavin v. Honda of America-Manufacturing, Inc.](#) (10/10/03) the U.S. Court of Appeals for the Sixth Circuit ruled that under the FMLA, an employer is not allowed to deny FMLA relief simply because the employee failed to comply with its internal notice requirements. "Where an employer's internal policies conflict with the provisions of the FMLA, the FMLA controls, and an employee need only comply with the requirements of the Act to invoke the protections."

EEOC Announces New Strategic Plan

On October 1, 2003, the U.S. Equal Employment Opportunity Commission issued its [Five Year Strategic Plan](#) for the period 2004-2009. The strategic plan includes a five-point plan to establish the framework for the EEOC's mission. The five-point plan is based on (1) proactive prevention of unlawful workplace discrimination, (2) proficient resolution of cases, (3) promotion and expansion of mediation and other forms of alternative dispute resolution techniques, (4) strategic enforcement and litigation, and (5) building the EEOC as a model workplace. The strategic plan also identifies three strategic objectives: justice and opportunity, inclusive workplace, and organizational excellence. Elements of the five-point plan are incorporated under each strategic objective. The strategic plan also reports on other recently-announced initiatives from the EEOC.

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