



ROBINSON & COLE LLP

## Labor, Employment & Benefits



### **FMLA Claim Remanded as the Employer Improperly Rejected Medical Certifications**

Peter Kauffman had been employed by Federal Express for over eighteen years when he was discharged under the company's "three strikes" policy. The third strike occurred when the company rejected as insufficient and untimely his doctor's notes excusing a bronchitis-related absence. Claiming discrimination and interference with his rights under the Family and Medical Leave Act, Kauffman filed a lawsuit in federal court. The trial court granted the company's motion for summary judgment and dismissed Kauffman's claim.

In [Kauffman v. Federal Express Corp.](#) (10/18/05), the U.S. Court of Appeals for the Seventh Circuit reversed the dismissal and remanded his case to the trial court. The appeals court determined that Kauffman was entitled to FMLA leave on the missed days and that the medical certifications he had submitted to FedEx were sufficient to support his entitlement to the leave. The court disagreed with FedEx's argument that the initial certification was insufficient, ruling that the certification was adequate even if it did not state the duration of the condition, because it stated that Kauffman was incapacitated for at least three days, his health condition kept him from being able to work, and the condition required two doctor's visits. A supplemental certification or addendum, submitted by Kauffman on the fifteenth day, was rejected by FedEx as late. Under the FMLA, in the event of an "unforeseeable" health condition, the employee must be given "15 calendar days after the employer's request" to submit medical certification. The addendum, which specified the duration of the health condition, was furnished by Kauffman on the fifteenth day, and was deemed timely by the court.

### **Jury Verdict of FMLA Violation against AutoZone Is Affirmed by Court of Appeals**

Christy Wilkerson took leave under the Family and Medical Leave Act for the birth of her child. Her employer, AutoZone, erroneously gave her a return date that was past the 12-week limit. In the meantime, a random drug test taken shortly before Wilkerson commenced her leave revealed that her urine sample had been adulterated with a substance designed to mask controlled substances. AutoZone decided to terminate Wilkerson for a failed drug test, but did not contact her during her leave. A few days before the anticipated return date, Wilkerson contacted her manager to confirm her return to work. The manager did not tell Wilkerson of the failed drug test or the company's decision to terminate her, but requested instead that Wilkerson submit a statement from her doctor releasing her to return to work. That same day, Wilkerson's doctor faxed a statement to AutoZone. Over the next few days Wilkerson called AutoZone to confirm receipt of her physician's release, but was unable to reach the manager and no one returned her calls. Wilkerson finally reported to work on her scheduled return date, which was past the expiration of the 12-week FMLA leave. She was then discharged for being a "no-call, no show" for the shifts she had missed. Wilkerson sued for violation of the FMLA. A jury found in her favor, awarding her \$56,000 for back pay and liquidated damages. AutoZone appealed.

In [Wilkerson v. AutoZone, Inc.](#) (10/17/05), the U.S. Court of Appeals for the Sixth Circuit affirmed the jury's verdict. The court found that the jury could have reasonably found that Wilkerson was entitled to reinstatement either on the day she submitted the medical release (had AutoZone confirmed its receipt, since it made it a pre-requisite to her return to work); or on the date AutoZone had told her she had to report to work. As to the failed drug test providing a legitimate basis for discharge, the court noted that the jury had been presented with the evidence and had reasonably rejected it. The company's normal policy was to discuss suspicious findings with the employee, something that was not done in this case. In any event, the company had decided to base the termination on violation of its "no call no show" attendance policy, which the court ruled was an untenable proposition when Wilkerson had been calling to find out when she could report to work.

### **Employers May Ask for New FMLA Certification in New Leave Year, Says U.S. Department of Labor**

In an [opinion letter](#) issued September 14, 2005, the Wage and Hour Division, Employment Standards Administration, of the U.S. Department of Labor clarifies that employers are entitled to ask employees for a new medical certification for their first FMLA absence in a new leave year. According to Deputy Administrator Alfred B. Robinson, Jr., "an employer may reinitiate the medical certification process with the first absence in a new 12-month leave year." Employers may request the new certification even if a recertification had been requested in the previous 12-month year. Recertification (at employee's expense unless provided otherwise by employer) may be requested on a reasonable basis as provided by 29 C.F.R. § 825.308.

### **Claim Challenging Denial of Severance Pay Was Properly Dismissed for Failure to Exhaust Administrative Remedies**

Anthony Madera was a long-term employee of a risk management and insurance brokerage company that was acquired by Marsh U.S.A. Upon the acquisition, Madera became a senior vice president, but subsequent reorganizations resulted in him becoming a "Middle Market Sales Leader." Within weeks of assuming the new position, Madera sent an e-mail to a former colleague, now employed with a competitor, seven separate internal Marsh documents regarding staffing, market alerts, and organizational changes. Marsh learned of Madera's disclosure and terminated his employment "for cause." Under the company's severance plan, Madera's conduct constituted "willful misconduct" and he was therefore ineligible to receive severance payments. Madera instituted a claim under the Employee Retirement Income Security Act, claiming that Marsh's "for cause" termination was a pretext for denying him severance benefits.

In [Madera v. Marsh USA, Inc.](#) (10/18/05), the U.S. Court of Appeals for the First Circuit affirmed the dismissal of Madera's claim on the basis that he failed to follow the administrative remedies outlined in the severance plan. The court ruled that the plan contained the appeal or review procedure required by ERISA; that the procedure was outlined in the company's handbook; and that Madera had adequate opportunity to understand the relevant provisions. Despite this opportunity, Madera elected to litigate, instead of utilizing the review procedure. Finally, the court noted that, even if Madera had exhausted his administrative remedies, the denial of severance payments was neither arbitrary nor capricious. The court determined that the e-mails he forwarded to the competitor contained detailed information about the company's internal operations. According to the court, this breach of trust was reasonably characterized as "willful misconduct" to make Madera ineligible for the severance payments.

### **Employee's Application for Social Security Disability Insurance Benefits Dooms ADA and ADEA Claims**

Gordon Johnson had worked for ExxonMobil Corporation for over 28 years. At the time of his discharge, he was 54 years old and had suffered from epilepsy for many years. Johnson claimed that his supervisor diverted his responsibilities to younger workers and deprived him of attending training programs necessary for advancement. Johnson eventually complained to Human Resources of age and disability discrimination. Three days later he was fired. Exxon stated that Johnson was discharged because of his frequent use of a company credit card for personal purchases. Johnson claimed he had never been told the card was not for personal use and that he paid for his personal purchases, and that younger, non-disabled employees who made personal use of the company card were not discharged. A year after Johnson filed his age and disability claim, he submitted an application for Social Security Disability Insurance benefits. In his application he claimed to be "unable to work as a result of his disabling condition" as of the date of his discharge from Exxon, a year earlier. The SSDI application required that Johnson swear that the information he provided was accurate.

In [Johnson v. ExxonMobil Corporation](#) (10/18/05), the U.S. Court of Appeals for the Seventh Circuit ruled that Johnson's claim under the Americans with

Disabilities Act was properly dismissed his SSDI application contradicted the ADA requirement that he be able to perform the essential functions of the position with or without a reasonable accommodation. His claim under the Age Discrimination in Employment Act was also properly dismissed because, under the ADEA, the plaintiff must be able to show that he is performing to the employer's legitimate expectations. Johnson's SSDI application, in which he admitted that he was unable to work, demonstrated that Johnson could not fulfill this requirement.

### **California Appellate Court Rules that Undocumented Worker is an "Employee" Entitled to Workers' Compensation Benefits**

In [Farmer Brothers Coffee v. Workers' Compensation Appeals Board](#) (10/17/05), the California Appellate Court ruled that the Immigration Reform and Control Act does not preempt a state workers' compensation law allowing undocumented workers to receive benefits. The court determined that, under the labor code, the term "employee" included "every person in the service of an employer ... whether lawfully or unlawfully employed" and that the law's protections, rights and remedies are available to individuals regardless of immigration status. Since IRCA's preemption clause expressly refers to sanctions for those who employ unauthorized workers, and the California Workers' Compensation Act does not contain any provisions addressing that issue, the court determined that there was no conflict between the statutes, and IRCA preemption did not apply. The court also rejected the argument that the undocumented employee was barred from benefits because he had engaged in insurance fraud by presenting fraudulent documents. The court noted that the fraud bar did not apply for two reasons: there was no record of a fraud conviction (a pre-requisite to the benefits bar), and the fraudulent documents were used to obtain employment, not to obtain the insurance benefits available under the workers' compensation act.

### **EEOC Issues Fact Sheets on Rights of Visually Impaired Individuals and Associational Rights**

On October 24, 2005, the Equal Employment Opportunity Commission issued a [Fact Sheet](#) addressing the rights of blind and visually-impaired individuals. The Fact Sheet discusses topics such as: when does a vision impairment constitute a disability under the Americans with Disabilities Act; what types of reasonable accommodations may be needed by visually-disabled employees; and how to prevent harassment of disabled employees.

This is the second Fact Sheet released by the EEOC in observance of National Disability Employment Awareness Month. On October 17, 2005, it released a [Fact Sheet](#) addressing the protection of applicants and employees because of their relationship or association with a person with a disability.

This is an archive of past issues. As a result, it may contain information that is not current.

