ROBINSON & COLE LLP
Labor, Employment & Benefits

Employee May Pursue Interference Claim against Employer for Failure to Inform Her of FMLA Rights

Upon learning of her pregnancy, Linda Reid-Falcone, the Associate Dean of Business and Industry Development for Luzerne County Community College, asked the college's human resources department about her rights under the Family and Medical Leave Act. A human resources associate told Reid-Falcone that maternity leave did not qualify for FMLA leave under the college's policy. As a result, Reid-Falcone did not request FMLA leave. While on maternity leave, the college made substantial changes to Reid-Falcone's job description and responsibilities. After she returned to work, Reid-Falcone claimed the college failed to return her to the same or equivalent position. She later sued the college for interference and retaliation under the FMLA. The college filed a motion to dismiss, arguing that no such claim exists under the FMLA.

Relying on the FMLA regulations that require employers to inform employees of their FMLA rights, the U.S. District Court for Pennsylvania in Reid-Falcone v. Luzerne County Community College (6/28/05) ruled that failure to communicate those FMLA rights to employees may constitute illegal interference. Accordingly, the court allowed Reid-Falcone to pursue her claim of interference. However, the court denied her claim of retaliation because she did not actually exercise her FMLA rights and, therefore, could not have been subjected to retaliation.

Reading is a "Major Life Activity" under the ADA

Matthew Head, a barge offloader, suffered from depression and bipolar disorder, which his employer learned about at the time of his diagnosis. A loader Head was using got stuck in the mud and his employer terminated him for violating the company's equipment abuse policy. Following termination, Head filed a lawsuit against his employer, claiming disability discrimination. The court dismissed his claims before trial and Head appealed.

In Head v. Glacier Northwest, Inc. (7/6/05), the U.S. Court of Appeals for the Ninth Circuit joined the Second Circuit in recognizing reading as a "major life activity" for purposes of establishing a disability under the Americans with Disabilities Act. In assessing whether reading constituted a major life activity, the appeals court noted that the activity of reading is central to most people's daily lives. The appeals court also ruled that Head's affidavit alleging that he is unable to read for more than three to five minutes at a time constituted sufficient evidence to demonstrate a substantial impairment of a major life activity, allowing Head to pursue his disability claim.

Transsexual's Sex Stereotyping Title VII Claim Fails

Krystal Etsitty was employed by the Utah Transit Authority as a bus driver. At the time she was hired, she dressed as a man. However, Etsitty is a transsexual who was taking female hormones. As a probationary employee, Etsitty filled in for regular bus drivers who were on vacation or sick leave and did not have a regular route. Shortly after her hiring, Etsitty notified her supervisor that she was a transsexual and would be dressing as a female at work. When the manager of operations learned that one of the drivers was a male dressing as a female, she expressed concern about the use of restroom facilities by this employee because the drivers use public restrooms along their routes. The manager of operations and a representative from human resources met with Etsitty and confirmed that Etsitty had not undergone sex reassignment surgery. The Transit Authority terminated Etsitty as a result of concerns for liability from co-workers, customers, and the public, but indicated that Etsitty was eligible to be rehired after undergoing sexual reassignment surgery.

In Etsitty v. Utah Transit Authority (6/24/05), the U.S. District Court for Utah found that Title VII does not extend protection to transsexuals and that its prohibition against sex stereotyping also does not apply to transsexuals. The court noted that sex stereotyping claims apply where an employer discriminates against a female employee who does not act as femininely as it believes she should or a male employee who does not act as masculine as it believes he should, but not where male employee is attempting to appear as a woman. In reaching this conclusion, the court noted that if an employer cannot prohibit a transsexual male from appearing as a woman, the employer would not be able to prohibit a non-transsexual male from appearing as a woman without engaging in sexual stereotyping and potentially leading to a situation where any employee could use the opposite sex's restroom or other facilities without employer interference.

Cross-Country Travel to Retrieve Family Car Does Not Constitute "Caring For" Wife under FMLA

H. Charles Tellis, a maintenance mechanic for Alaska Airlines in Seattle, Washington, obtained leave under the Family and Medical Leave Act to care for his wife who was experiencing difficulties with her pregnancy. On the second day of his FMLA leave, Tellis' motor vehicle broke down. Because the family owned another vehicle in Atlanta, Georgia, Tellis decided to fly to Atlanta to retrieve the car and drive back to Seattle. While he was gone, Tellis regularly called his wife on his cell phone and his wife gave birth to a baby girl during his absence. When Tellis failed to return to work or notify Alaska Airlines as to his whereabouts, Alaska Airlines terminated him for unexcused absences.

In Tellis v. Alaska Airlines, Inc. (7/12/05), the U.S. Court of Appeals for the Ninth Circuit rejected Tellis claim that his absence to retrieve the car was "caring for" his wife and, accordingly, was protected under the FMLA. In assessing Tellis' claims, the appeals court ruled that "caring for" a family member under the FMLA requires the employee to be in close and continuing proximity to the sick family member. Because Tellis traveled to Atlanta to retrieve the family vehicle and was not in close or continuing proximity to his ill wife, the appeals court determined that he was not "caring for" his wife and, therefore, was not entitled to FMLA protection.

OFCCP Completes Recordkeeping Rule for Internet Applicants

On July 5, 2005, the Office of Federal Contract Compliance Programs issued a final rule on the types of information on Internet applicants that federal contractors are required to maintain. The rule requires recordkeeping of Internet applicants and defines an "Internet Applicant" as: (1) an individual who expresses an interest in employment through the Internet or other electronic technology; (2) the employer considers the individual for a specific position that is available; (3) the individual indicated that he/she possessed the qualifications for the advertised position; and (4) the individual did not withdraw interest in the position. Under this definition, individuals who do not identify a specific position in their application do not constitute "Internet Applicants" and recordkeeping obligations do not apply. The rule will become effective upon publication in the Federal Register.

Connecticut Workers' Compensation Benefits Extended to National Guard Members

On July 1, 2005 Connecticut enacted Public Act 05-236, a new law requiring employers to provide workers' compensation benefits to members of the Connecticut National Guard who are called to active duty by the governor and who are injured while on duty through no fault of their own.

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