Written Notice During Six-Month Period Prior to Leave Necessary to Inform Employees of their Obligations to Qualify for FMLA Leave

October 13, 2010

One would think that if a physician's certification indicated that an employee did *not* require any leave of absence, the employer could terminate the employee for attendance violations without running afoul of the Family and Medical Leave Act. However, in *Branham v Gannett Satellite Information Network*, the Sixth Circuit Court of Appeals reversed the lower court's dismissal of a case presenting this scenario and remanded it for trial.

Deborah Branham worked for Gannett Satellite Information Network Inc. as a receptionist for *The Dickson Herald* in Tennessee. She began missing work for personal health problems on Nov. 9, 2006 and saw Dr. Singer on Nov. 13, indicating she was suffering from migraine headaches, menstrual problems, depression, insomnia and a stomach virus. Her examination was "normal," and Dr. Singer indicated she could return to work the next day.

Branham did not report to work the next day, but on Nov. 15, conveyed this information to her employer, Gannett, adding she wasn't feeling well and would need to miss work for other doctor's appointments in November and December. Branham was *verbally* told to sign a form for short-term disability (STD) leave and that she could do some work from home to help with the month-end close out. Branham continued to be absent from work.

On Nov.17, Dr. Singer faxed the medical certification form to Gannett, indicating that Branham's condition began on Nov. 10, she was capable of returning to work on Nov. 14, and that she did not require intermittent leave. On Nov. 20, Gannett verbally informed Branham that her job was in jeopardy unless she could provide other medical documents showing her need to be off work. The next day, Gannett verbally expressed concern to Branham that she was taking so long to return the medical documentation.

On Nov. 24, having not received such records, the decision was made to terminate Branham. The termination letter was mailed Nov. 28 at 9:44 a.m. After the close of business that same day, Branham faxed to Gannett a medical certification prepared by a nurse practitioner, who worked with Dr. Singer.

Based on the above facts, the federal district court dismissed the case, finding Gannett was permitted to terminate Branham in reliance on the original "negative" certification. The Sixth Circuit disagreed, finding she had a serious health condition and that Branham had satisfied her notification requirement when she told her employer she was still not feeling well and had numerous doctors' appointments scheduled in November and December.

According to the Sixth Circuit, the problem for Gannett was that it *never* triggered Branham's obligation to supply a medical certification form. While the STD form "doubled" as its FMLA leave form, Gannett failed to convey to Branham any information concerning the FMLA certification requirement that it is due within 15 calendar days and that there are consequences for failing to return an adequate certification.

The court noted that even if Gannett had *verbally* conveyed such information to Branham, such notice would have been insufficient since there was no evidence that Branham had "requested leave and received *written* notification of the requirement in the previous six months, or that the requirement appeared in the employee handbook that Branham should have received when she first joined Gannett …" In short, Gannett had no right to delay or even deny FMLA leave to Branham based on the certification requirement.

The lesson to be learned is that employers must provide *written* notice to employees concerning their obligations under FMLA. The safest way to avoid Gannett's mistake is to have a well worded detailed FMLA policy in the employee handbook. Employers hovering around the "50 or more employees within 75 miles" requirement may also be wise to have such a policy in their handbooks, but emphasize at the top of the policy that it is not in effect unless and until such requirement is met. This will ensure that the requisite notice has been given should the employer unknowingly grow into becoming subject to FMLA.

Also of significance in this case was an issue of first impression that was side stepped by the court. Specifically, "when an employee provides a negative certification – that is, a certification indicating that she does not have a serious health condition that prevents her from performing her job – must the employer wait the full 15 days prescribed by regulation before denying leave on the basis of that negative certification?"

While the district court answered "no" to that question, statements made by the Sixth Circuit suggest that it would require the employer to wait. While it is rare for employees to present "negative" certifications and continue missing work, employers should not only provide written notice of the need of certification in 15 days, but to wait the full 15 days before terminating an employee based on one any negative certification received.