Lessons Learned From FMLA Retaliation Trial

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We recently secured a verdict in favor of an employer in a federal jury trial over alleged Family Medical Leave Act (FMLA) retaliation. The employee claimed retaliatory animus in a series of human resources errors regarding the employee's intermittent leave. Further complicating the situation were stray remarks by the employer's personnel implying displeasure over the employee's use of intermittent leave. We were able to credibly explain each circumstance, and diffuse all suggestion of retaliatory animus.

The lessons learned by the employer through the trial have improved its human resources processes. Hopefully this employer's trial experience can benefit other employers, too. And so, we share our observations for your consideration:

- **Training.** The errors identified through this trial resulted from lack of human resources experience. Personnel without prior human resources experience were tasked with handling responsibilities for which they had never been trained. Although mistakes happen (we are all human), a properly trained human resources staff will minimize risk of error. The employer should look to an appropriate outside resource to provide training to human resources personnel. Since the employment laws are an ever evolving body, one-and-done training is inadequate, and periodic updates should be provided.
- **Procedures.** This trial exposed the hazard of inadequate procedures and inconsistent application of procedures. Perhaps related to a lack of experience, the human resources department had not developed adequate procedures for handling intermittent FMLA requests and the procedures that existed were not consistently followed. Appropriately experienced human resources professionals should develop procedures, forms, and practices to consistently meet the employer's obligations. These should be revisited periodically to assure that the most up-to-date requirements are being followed.
- **Application.** Training and procedures are only as good as their application. Supervisors' negative comments about the employee's attendance were presented at trial. Most of the supervisors were unaware of the employee's FMLA status. Regardless, none of the supervisors had been made aware of the policies and procedures for addressing an employee using intermittent FMLA leave. Fortunately for this employer, the jury understood that the negative comments resulted from ignorance of the employee's status and were not because of the employee's status. This serves as a reminder that supervisors should be included in human resources training programs.

Considering that an ounce of prevention is worth a pound of cure, the cost of remaining updated on a regular basis is far less expensive than the litigation costs, operational disruptions, and risk of exposure to an adverse verdict resulting from a trial. Please take these lessons to heart and stay informed. The Labor and Employment Group at White and Williams regularly provides training and procedural guidance to employers. Please contact Marc Casarino (302.467.4520; casarinom@whiteandwilliams.com) or any other member of the Labor and Employment Group to discuss how we can help your company.