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FMLA DILEMMA: SHOULD I GET A SECOND OPINION?

David Slovensky and Robert Stevens

Employers face many difficulties in managing an employee who wants to count an absence as qualifying under the Family Medical Leave Act (FMLA). Because the FMLA regulations can be read to create a relatively low threshold, many routine doctor visits can trigger an FMLA-qualifying event. For example, an employee may claim that he has a "serious health condition" even if he only missed three days of work, had one doctor's visit, and received a medical prescription. As a result, employers who have doubts about the seriousness of a condition or even whether it was properly diagnosed must be aware of the procedure for challenging the validity of an initial FMLA certification.

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MANAGING LEAVES OF ABSENCE SEMINAR

Thursday, November 11, 2004

4:30 - 6 p.m.
with cocktails to follow

The Capital Club
1051 East Cary Street
Richmond, Virginia

RSVP to karen.longworth@troutmansanders.com or 804-697-1345

Program will be submitted for CLE and SHRM credit.

FMLA DILEMMA: SHOULD I GET A SECOND OPINION?

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The initial FMLA certification is especially important because an absence that is FMLA-qualified can have repercussions that last long after the employee has returned from his initial leave. For instance, an employee who is diagnosed with an FMLA-qualifying condition involving recurrent anxiety attacks can be expected to miss work sporadically and without notice. The FMLA prohibits employers from disciplining the employee for those absences. In addition, once the condition has been certified, it will be difficult for the employer to later challenge whether the employee had a serious health condition in the first place. Further, these absences could be particularly burdensome if the employee has specialized duties and it is difficult for the employer to find a substitute on short notice.

There are several reasons that an employer may have significant concerns about the validity of an initial FMLA certification. The doctor may be making a diagnosis that is outside of his specialty or he may have a history of diagnosing the same condition for other employees. In addition, if the employee's condition involves highly subjective symptoms that are difficult to diagnose, the employer may want a second opinion from a specialist in that field. Even worse, the employer may doubt the sincerity of the employer's report of the injury or illness.

The FMLA limits not only an employer's ability to manage the employee's absences, but also its ability to investigate the extent of the employee's condition. If the employer has received a completed medical certification reflecting a serious health condition from the employee's doctor, the employer is permitted

to contact the doctor only to clarify or authenticate the employee's medical certification — as long as the employer first obtains approval from the employee.

Nevertheless, employers are not completely powerless to challenge the validity of an initial certification. In many cases, the employer may choose to seek a second opinion from a different doctor. The applicable FMLA regulations, however, place certain restrictions on this process. The doctor whom the employer selects cannot be a company doctor or a doctor with whom the employer regularly contracts. In addition, absent unusual circumstances, the employer may not require the employee to travel outside his normal commuting distance for a second opinion. The employer also must pay for the second opinion and reimburse the employee for any reasonable transportation costs incurred.

Unless the second opinion confirms the first doctor's diagnosis, the employer must then seek a third opinion from a doctor who is approved by both the employee and employer. Until the final diagnosis is made, the employee is provisionally covered by the FMLA. As with the second opinion, the employer must pay all costs relating to this examination, including the reasonable travel costs incurred by the employee. The third opinion is the final and binding opinion regarding the employee's condition. If the final diagnosis does not reflect a serious health condition, the employer may count the absences as non-FMLA qualifying under its policies.

Although an employer is not completely at the mercy of the employee's doctor in determining whether the employee qualifies for FMLA leave, the option of seeking a second opinion can be expensive and time-consuming. For that reason, an employer should request a second opinion when it has significant concerns about the legitimacy of

the employee's condition, the accuracy of the doctor's diagnosis, or the potential for recurrent absences based on the same condition.◆

“THE HARASSMENT MADE ME QUIT MY JOB”

Rebecca Williams

Here's the scenario: your human resources department accepts the resignation of one of your best employees. Two weeks later, you receive notice from the EEOC that the employee has filed a charge of discrimination against your company, alleging that she was sexually harassed by a supervisor and forced to quit because of the harassment — in other words, she was “constructively discharged.” You are shocked. Your company has a policy that strictly prohibits any kind of unlawful harassment in the workplace, and it includes real and effective complaint procedures for your employees to use.

It turns out that the employee never complained to anyone about this supposed harassment before quitting, but her supervisor admits to making inappropriate remarks and engaging in other possibly harassing behavior. You terminate the supervisor, but how do you defend the employee's constructive discharge claim? A new decision by the U.S. Supreme Court recognizes the difficulties faced by employers in these and similar situations and allows employers to assert their anti-harassment policies and procedures as a defense.

Searching for an explanation of “Tangible Job Action”

The Supreme Court decided to hear the case, *Pennsylvania State Police v. Suders*, in part because of differing views taken by lower courts in interpreting the Supreme Court's groundbreaking decisions in *Faragher* and *Ellerth*, two cases decided together in 1998. In those cases, the Supreme Court set forth what has come to be known as the “*Faragher/Ellerth* affirmative defense” to claims of sexual harassment by a supervisor. An employer may assert the defense and avoid liability by showing (1) that it had a readily accessible and effective policy to report and resolve claims of harassment, and (2) that the employee unreasonably chose not to take advantage of that policy. But there is a catch: the employer may assert the *Faragher/Ellerth* defense *only* where the supervisor did not take any tangible job action against the employee. After the *Faragher* and *Ellerth* cases, the lower courts had to interpret the meaning of “tangible job action.” All lower courts agreed that certain actions, such as termination or demotion, were tangible job actions that would prevent an employer from asserting the *Faragher/Ellerth* affirmative

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“THE HARASSMENT MADE ME QUIT MY JOB”

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defense. The courts disagreed, however, when it came to other events in the workplace, such as discipline or constructive discharge.

Suders’ “Tangible Job Action”

Enter Nancy Drew Suders, a Pennsylvania State Police Communications Officer who alleged that she was driven off the job by a sexually harassing hostile work environment created by three supervisors. According to Ms. Suders, three supervisors subjected her to a continual barrage of sexual harassment during her employment. After several of these alleged incidents, Ms. Suders contacted the State Police’s EEO officer, claiming that she was being harassed. The officer told Ms. Suders to submit a complaint, but did not tell her how to get the necessary form. Two days later, Ms. Suders’ supervisors arrested her (supposedly for removing from the workplace a set of exams she had taken to satisfy a job requirement), and she resigned from the force. Ms. Suders then sued the State Police, arguing that she was subjected to sexual harassment and constructively discharged in violation of Title VII.

The trial court allowed the State Police to assert the *Faragher/Ellerth* defense — that they had an effective policy against harassment and Ms. Suders unreasonably failed to use it — and awarded judgment for the State Police. Ms. Suders appealed, arguing that the alleged constructive discharge was a “tangible job action” that precluded the State Police from asserting the *Faragher/Ellerth* defense. The Third Circuit agreed with Ms. Suders and

remanded the case for trial. The Supreme Court agreed to hear the case and reversed the court of appeals’ decision. The Justices recognized that Ms. Suders’s case involved a particular subset of Title VII constructive discharge claims: constructive discharge based on a hostile work environment caused by a supervisor. They noted that, unless some official act of the employer is “the last straw, the employer would have no particular reason to suspect that a resignation is not the typical kind daily occurring in the workforce.” In other words, an employer cannot know about (and cannot do anything to correct) harassment that forces an employee to resign unless the employee follows the company’s procedures and reports the improper conduct. Thus, the *Faragher/Ellerth* defense should be allowed in all hostile environment cases, including those involving constructive discharge, as long as there was no tangible employment action (such as a termination) by the supervisor.

The Court’s decision is a refreshingly common-sense ruling that provides employees with an incentive to report harassment and employers with an opportunity to correct it. The case rewards employers who are diligent to watch over their own supervisors and requires employees to use in-house complaint mechanisms. So, what does the *Suders* case mean for our hypothetical employer above, who was blind-sided by the EEOC charge alleging harassment that forced an employee to resign? The company is now assured of the opportunity to present its anti-harassment policies and complaint procedures as a defense. ♦

CENSUS 2000 EEO DATA NOW REQUIRED FOR 2005 AFFIRMATIVE ACTION PLANS

The Office of Federal Contract Compliance Programs (OFCCP) requires federal contractors to prepare and maintain annual affirmative action plans (AAPs). In preparing an AAP, a contractor must determine how many qualified minorities or women were available in a metropolitan area for job openings that the contractor filled during the 12 months documented in the AAP. Many contractors use U.S. Census Bureau data to make this "availability" determination.

On December 29, 2003, however, the U.S. Census Bureau released the long-awaited 2000 Equal Employment Opportunity File, which is a snapshot of the U.S. population as of April 2000 and reports nationwide gender and race characteristics for 472 job categories. Because the 2000 Equal Employment Opportunity File now comprises the "most current and discrete statistical information available," federal contractors who use census data to determine availability should now use this File in preparing their 2005 AAPs.

THE IMPORTANCE OF PRESERVING ELECTRONIC EVIDENCE

Leslie Parpart

Computer systems and e-mail communication have made offices more efficient and productive than ever. Employers and their employees are able to store and retrieve information easily and quickly, thereby increasing productivity and profits. However, there is a danger lurking among this electronic data—all of the e-mails and data stored in an organization's computer system may be subject to discovery in the event of litigation. In addition, companies have a duty to preserve electronic evidence, and, as some recent decisions have illustrated, courts are placing a high burden on employers to protect, preserve, and produce this information. Failing to understand the implications of electronic discovery during litigation could increase the cost of discovery and create the potential for

sanctions.

Establishing Policies Concerning Electronic Data

It is essential that companies examine their electronic systems for several items related to the retention and production of information. First, a company must have a clear policy regarding electronic communication and the regular retention and destruction of electronic information. Such a policy must make clear that e-mail communications are not private, and employees must understand that they should not write anything in an e-mail that they would not want to be broadcast to their entire company or over the internet. Companies should also maintain policies regarding the type of electronic information that is retained, the amount of time it is retained, and the process by which the

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THE IMPORTANCE OF PRESERVING ELECTRONIC EVIDENCE

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electronic information is regularly destroyed. Further, such policies should be implemented in a consistent and comprehensive manner.

Preserving Electronic Data for Litigation

In addition to these basic policies, a company should also have a policy concerning situations where litigation is threatened. Many courts have held that a company has a duty to preserve information when it reasonably should know that evidence may be relevant to anticipated litigation. Because a company's obligations regarding discovery can begin before a lawsuit is even filed, preventing the spoliation of electronic data is often a primary concern. A company's normal document retention and destruction policy may conflict with the needs arising from potential litigation. In some cases this means altering the normal procedures relating to the retention of electronic data. A company should prepare for this eventuality before the problem arises by devising a plan to ensure the protection of potentially relevant electronic data.

The general rules of discovery apply to electronic data, as parties have an ongoing duty to preserve and produce relevant information. In some cases, once the threat of litigation materializes, opposing counsel will provide a company with a notice to preserve documents. In the absence of such a notice, a company should continue to actively preserve relevant information and begin preparing it for production to opposing counsel. Once opposing counsel serves a

request for the production of documents, the company, working with its attorneys, should create a plan to address the search for, the location of, and the retrieval process of the electronic data. The plan should also include the form of production and/or inspection, the manner of preservation, and the use of such information throughout the litigation. In some cases, there may be significant issues related to privileged information—attorney-client and attorney work product as well as protection of trade secrets. These considerations should be discussed and incorporated into the company's discovery plan.

Preserving Electronic Data

It is often the case that the process of producing electronic data is an expensive one. This is another consideration that should be discussed at the onset of litigation. The general rule is that the costs of discovery must be born by the responding party; however, in cases where the costs represent an undue burden or expense, courts may consider shifting some or all of the costs to the party making the request.

Consequences of Failing to Preserve Data

While preparing for and actually producing electronic records may be a painstaking and expensive undertaking, the potential costs of failing to do so are significant. Indeed, a company which does not protect against the spoliation of electronic information and which does not properly

produce electronic information may be subject to stiff penalties from the courts.

Some court decisions have provided guidance and warnings to companies who are not adequately preserving and producing electronic information. In a recent case out of the Southern District of New York, the court specifically analyzed whether a company had failed to preserve and timely produce relevant information. The court determined that the company had both destroyed and failed to produce information. In light of this finding, the court required the company to pay the costs of re-deposing several key witnesses as well as the costs of restoring the electronic information. Additionally, it required the company to pay the plaintiff's attorney's fees regarding these discovery issues and even gave an adverse jury instruction based upon

the company's actions. The court also issued a postscript in its opinion acknowledging that electronic discovery could no longer be considered a new development. "Parties and their counsel are fully on notice of their responsibility to preserve and produce electronically stored information....It is hoped that counsel will heed the guidance provided by these resources and will work to ensure that preservation, production and spoliation issues are limited, if not eliminated." In this day and age, companies must be especially mindful of the duties of preserving electronic evidence. ♦

FIFTH CIRCUIT UPHOLDS MANDATORY ARBITRATION ON FLSA CLAIM

Another U.S. Circuit Court of Appeals recently ruled that overtime claims brought under the Fair Labor Standards Act (FLSA) are subject to mandatory arbitration agreements between an employer and employee.

In joining the Fourth and Ninth Circuits, the Fifth Circuit held in *Carter v. Countrywide Credit Industries, Inc.* that the district court had properly compelled the arbitration of an FLSA collective action brought by a group of former employees who claimed they were improperly denied overtime pay. In doing so, the Court rejected the plaintiffs' arguments that FLSA claims are

fundamentally inappropriate for arbitration and that their rights under the FLSA would somehow be infringed upon by the arbitration process. The Court further held that the arbitration agreement at issue was not unconscionable and that a potentially illegal fee-splitting provision in the agreement was moot in light of the employer's offer to pay all of the fees associated with arbitration.

The *Carter* decision provides additional support for employers who desire to resolve disputes through the use of mandatory arbitration agreements and suggests that FLSA disputes are subject to such mandatory arbitration agreements if they are expressly set forth in the arbitration agreement.

EMPLOYER LIABILITY FOR NEGLIGENT HIRING AND RETENTION

Daniel Schert

While Georgia courts have recognized that employers may be held liable for negligent hiring and negligent retention, there has been some confusion regarding what a plaintiff must show to hold an employer liable for these claims. Georgia law requires employers "to exercise ordinary care in the selection of employees and not to retain them after knowledge of incompetency." Therefore, Georgia courts have acknowledged employer liability for hiring or retaining an employee whom the employer knows or should have known, was not suited for the particular employment. Confusion has arisen, however, over the level of knowledge that must be established in order to find an employer liable. The Supreme Court of Georgia's recent decision in *Munroe v. Universal Health Services, Inc.* helps to clarify this confusion.

Employer Had Investigated Offending Employee

In *Munroe v. Universal Health Services, Inc.*, Christine Munroe, who had been a patient at Universal Health Services' residential treatment facility ("Universal"), brought suit against Universal for its alleged negligent hiring and retention of one of its employees. Munroe claimed that a mental health assistant employed by the health center had administered her with an incapacitating medication, and had then raped her. To defend against Munroe's claims, Universal produced evidence that it had exercised reasonable care in hiring the mental health assistant. Specifically, Universal showed that it

had hired a professional investigation service to perform a background check on the mental health assistant and that the investigation revealed no criminal activity by the mental health assistant.

The investigation, however, also revealed some problems. Universal received information that the mental health assistant had misrepresented the reason for his discharge by a previous employer. Additionally, the investigation service informed Universal that it had been unable to confirm the existence of two prior employers the mental health assistant listed on his application and that it could not verify enrollment records at the high school from which the mental health assistant allegedly graduated.

In its holding, the Court specifically rejected arguments presented by both parties regarding the level of knowledge an employer should have about the suitability of an employee. First, the Court rejected Munroe's argument that Universal should be liable for the negligent hiring or retention of the mental health assistant solely because his employment by Universal provided him with the access or opportunity to injure Munroe. The Court also rejected the standard Universal proposed, which would have required proof that the employer knew or should have known of an employee's propensity to commit the tortious or criminal act that caused the injury. Instead, the Court took a more flexible approach, holding that an "employer has a duty to exercise ordinary care not to hire or retain an employee the employer knew or should have known posed a risk of harm to others where it

is reasonably foreseeable from the employee's tendencies or propensities that the employee could cause the type of harm sustained."

Employer Not Liable

The Court concluded that while the pre-hire investigation revealed potential problems, those problems did not involve any accusations of criminal activities, violent behavior, or an indication that the employee posed a risk of personal harm to others. Therefore, while the inaccurate or incomplete information provided to Universal by the mental health assistant may have rendered him an unsuitable employee for reasons unrelated to Munroe's injuries, the Court held that Universal did not breach its duty to avoid hiring an employee who posed a reasonably foreseeable risk of inflicting personal harm on others.

Need For Reliable Background Checks

The Court's decision in *Munroe* not only reinforces the existence of potential liability to employers for negligent hiring and retention, it highlights the need for many employers to perform adequate background checks of prospective employees. While the background of potential employees is not a significant concern in many industries, in industries such as childcare, patient care facilities, chemical manufacturing and other sensitive industries, background checks and criminal searches may be necessary for an employer to avoid liability. The Court in *Munroe* clearly established this point by stating "a jury may find that employers who fill positions in more sensitive businesses without performing an affirmative background or criminal search on job applicants have failed to exercise ordinary care in firing suitable employees." Accordingly, employers should be careful to evaluate their hiring and retention practices to ensure they are taking appropriate measures to avoid liability. ♦

RECENT DECISION TAKES AWAY "WEINGARTEN" RIGHTS FROM NON-UNION EMPLOYEES

Ross Bergethon

In 1982, the United States Supreme Court ruled in *NLRB v. J. Weingarten, Inc.*, that employees in unionized workplaces were entitled to have a union representative present during investigatory interviews. The National Labor Relations Board (NLRB) later extended *Weingarten* rights to the non-union setting, giving employees the right to have a co-worker present in such an interview.

However, in a June 2004 decision, the NLRB reversed course by ruling that

Weingarten rights were limited solely to unionized workplaces. In *I.B.M. Corp.*, the NLRB dismissed the complaints of three discharged employees who were not allowed to have a co-worker present during investigatory interviews. The Board's rationale for this new position was that co-workers are unlike union representatives in that they do not represent the interests of the entire unit of employees, cannot redress the perceived imbalance of power between the employer and employees, and cannot aid in facilitating the interview process. The stated impetus for this decision was the recent rise in

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RECENT DECISION TAKES AWAY “WEINGARTEN” RIGHTS FROM NON-UNION EMPLOYEES

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investigatory interviews due to both newly incurred statutes governing the workplace and security concerns raised by terrorist attacks.

This decision, which recognizes the inherent differences between unionized and

non-unionized workplaces, should allow employers to conduct more efficient workplace interviews into such issues as discrimination and harassment, corporate abuse, and workplace violence without sacrificing confidentiality and without fear of unfair labor practice complaints. ♦

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