EMPLOYERS RISK FMLA CLAIMS FOR TERMINATING EMPLOYEES WHOSE UNEXPLAINED ABSENCES MAY BE MEDICALLY RELATED

On March 14, 2019, a federal court in Pennsylvania issued a noteworthy decision that should remind employers to ask if an employee's unexplained absences may be due to medical reasons, before terminating the employee for not reporting to work.

Firing the absent employee could give rise to liability for interference and retaliation with an employee's rights under the Family and Medical Leave Act (FMLA) if the employer is on notice that the absences are medically-related.

THE BOTTOM LINE

The *Villagomez* decision highlights the legal risks in automatically firing an "AWOL" employee. Under the FMLA, employers have an obligation to follow up on facts, however scant, suggesting that unexplained absences may be due to medical reasons. HR and supervisors should share what they know about the reasons for employee's absences, and if any medical issue is revealed, gather more information or risk an FMLA lawsuit.

VILLAGOMEZ V. KAOLIN MUSHROOM FARMS

In *Villagomez*, the plaintiff, Javier Lopez Villagomez, was employed by defendant Kaolin Mushroom Farms (the Farm). Approximately one year after he was hired, Mr. Villagomez hurt his ankle playing soccer, however, he reported to work, spoke to his supervisor about his injury and then left to seek medical treatment. The next day, he spoke with the Farm's Human Resources (HR) department about obtaining FMLA paperwork. He took an FMLA leave, remained in regular contact with HR and ultimately returned to work.

Several months later, Mr. Villagomez again injured himself playing soccer. He sought treatment and learned that his leg was broken. He claimed that he left a voicemail with HR saying that he would not be reporting to work because he "had an accident outside of work." Mr. Villagomez's brother, who also worked at the Farm, also contacted their supervisor stating that he could not report to work because his injured brother could not drive him. (The supervisor denied any knowledge of an accident, injury or any other medical issue that would explain Mr. Villagomez's absences. The Farm denied that Mr. Villagomez had given a reason for his absence on the voicemail.)

After leaving the voicemail, Mr. Villagomez did not contact the Farm, HR never called him and he never received any FMLA paperwork for his second injury. He did not report to work for a month, and, upon his return, provided HR with documentation of his injury. HR refused to accept it, and instead informed him that his employment had been terminated in accordance with the Farm's Attendance and Punctuality Policy. Under the Policy, employees were required to call in at least an hour before their scheduled shift if they would not be able to report to work, and "identify the reason for the absence and the anticipated return to work date." The Policy also provided that absences for three consecutive

>> continues on next page

days without good cause, and without giving proper notice to the company, shall be considered as having quit."

Mr. Villagomez filed claims against the Farm for interfering with his right to take an FMLA leave and for retaliating against him for taking an FMLA leave.

EMPLOYEE RIGHTS UNDER THE FMLA

Under the FMLA, eligible employees are entitled to 12 workweeks of leave during any 12-month period due to their own serious health condition. An employee must give notice that they will be seeking FMLA leave "as soon as practicable where the need for leave was not foreseeable." When a leave is unforeseeable, notice must "comply with the employer's usual and customary notice and procedural requirements for requesting leave, absent unusual circumstances," and include "sufficient information for an employer to reasonably determine whether the FMLA may apply to the leave request." Employees generally satisfy their notice obligation, even without providing detailed information, if their employer knows or should know that the FMLA applies.

THE DISTRICT COURT DENIES THE EMPLOYER'S MOTION SEEKING DISMISSAL OF THE FMLA CLAIMS

Because Mr. Villagomez did not take a second FMLA leave, and instead his employment was terminated, the question for the court was whether he had provided sufficient "notice" of his need for a second FMLA leave. The court viewed the adequacy of notice as a question of fact that should be considered in a light most favorable to Mr. Villagomez.

The court accepted as true that Mr. Villagomez reported to HR that he had an accident, and that his brother had informed a supervisor that the injured brother could not drive him to work. The court seemed to find credible that Mr. Villagomez understood that HR would reach out to him with the FMLA paperwork because that is how HR handled things the first time he was injured. Based upon these facts, the court determined that Mr. Villagomez had provided notice, but was denied FMLA leave, such that he had stated FMLA claims which survived summary judgment. According to the court, after learning that Mr. Villagomez's absence from work was medically-related, the Farm had a duty under the FMLA to determine if FMLA benefits would be applicable. Instead, the Farm fired him. Thus, the court determined Mr. Villagomez is entitled to a trial on both his FMLA interference and retaliation claims.

EMPLOYER TAKEAWAYS

Employers should not assume that employees have a significant burden to explain in detail why they are absent from work in order to trigger FMLA rights. Instead, if an employee discloses any medically-related explanation for his or her continued absence from work, the employer has the burden to inquire whether these reasons are FMLA-qualifying.

Employers should train HR and supervisors not jump to the conclusion that any employee who has failed to show up for work, even in violation of an attendance policy, may be terminated without legal risk. Rather, employers should gather facts to insure they have a clear understanding of what, if anything, the employee, or the employee's family members, have reported regarding the reasons for the employee's absence.

Finally, the *Villagomez* case serves as a reminder to employers that refusing to accept a medical explanation for absences that were previously unexplained, can result in FMLA claims that are costly to defend.

FOR MORE INFORMATION

Maureen McLoughlin
Partner
212.468.4910
mmcloughlin@dglaw.com

or the D&G attorney with whom you have regular contact.

Davis & Gilbert LLP
212.468.4800
1740 Broadway, New York, NY 10019
www.dglaw.com