



## Legal Alert: Ninth Circuit Finds Employer Has Burden of Proof When Denying Reinstatement After FMLA Leave

5/6/2011

In a case of first impression on a claim that an employer interfered with an individual's exercise of her rights under the Family and Medical Leave Act (FMLA), the Ninth Circuit Court of Appeals recently held that the employer bears the burden of proving it had a legitimate reason for not reinstating the employee to her former position following FMLA leave. The court further held that the employee is not required to demonstrate that her employer lacked a reasonable basis for its refusal to reinstate her. *Sanders v. City of Newport* (9th Cir. March 17, 2011).

### **Background**

Sanders, a former utility billing clerk who had worked for the City of Newport for approximately 10 years, began suffering health problems after the City moved her office to a new location and started using lower-grade billing paper. After being diagnosed with "multiple chemical sensitivity" triggered by handling low-grade paper at work and poor air quality in her work area, Sanders requested and was granted one month of FMLA leave. This leave was later extended because of an unrelated medical condition.

Subsequently, Sanders submitted a letter from her doctor stating that she had recovered from her unrelated medical condition and she could return to work, so long as she avoided use of the problem-causing low-grade paper. Sanders also submitted a fitness for work certificate from the surgeon who treated her unrelated medical condition.

On May 5, 2006, the City informed Sanders that she would not be permitted to return to work because the City could not guarantee that her workplace would be safe for her to due to her chemical sensitivity. On January 8, 2007, the City sent Sanders a letter advising her that her employment would be terminated that same day "due to the restrictions placed on [her] by [her] physician, Dr. Morgan, which the City is unable to accommodate." Sanders filed an administrative appeal. In response to her appeal, the City informed her: "The decision to terminate your employment was made for the reason that the City could not provide a safe workplace for you given your sensitivity to chemicals and the lack of knowledge as to the chemicals or concentrations that may cause a reaction."

Sanders subsequently sued the City in federal court, claiming violations of

the FMLA, the Americans with Disabilities Act (ADA) and the Oregon Family Leave Act (OFLA), as well as other federal and state laws. After the jury returned a verdict for the City on Sanders' FMLA claim, she filed an appeal with the Ninth Circuit. Sanders argued that the court's FMLA jury instruction improperly placed the burden on her to prove that she was denied reinstatement without reasonable cause and that by adopting a reasonable cause requirement, the court incorrectly stated the elements of her FMLA claim.

The Ninth Circuit agreed with Sanders and reversed the lower court's decision, remanding the case for a new trial.

### ***FMLA Interference Claim***

Under 29 U.S.C. §2615(a)(1), it is "unlawful for any employer to interfere with, restrain, or deny the exercise of or the attempt to exercise" the substantive rights guaranteed by FMLA. When a party alleges a violation of §2615(a)(1), it is known as an "interference" or "entitlement" claim. The Ninth Circuit held that the right to reinstatement is the linchpin of the entitlement theory because "the FMLA does not provide leave for leave's sake, but instead provides leave with an expectation that an employee will return to work after the leave ends." (Citations omitted). Thus, evidence that an employer failed to reinstate an employee who was out on FMLA leave to her original (or equivalent) position establishes a prima facie denial of the employee's FMLA rights. See 29 C.F.R. §825.220(a)(1),(b)[1].

Citing decisions from the Sixth and Seventh Circuits, the Ninth Circuit summarized the elements of an employee's prima facie case where the employer fails to reinstate the employee: "the employee must establish that: (1) he was eligible for the FMLA's protections, (2) his employer was covered by the FMLA, (3) he was entitled to leave under the FMLA, (4) he provided sufficient notice of his intent to take leave, and (5) his employer denied him FMLA benefits to which he was entitled." The court also noted that in interference claims, the employer's intent is irrelevant to a determination of liability.

The court then held that although the FMLA creates a statutory right to reinstatement after taking FMLA leave, this right is not without limits. The court noted that the Department of Labor (DOL) has interpreted this part of the statute in various regulations that set forth the limitations on an employee's right to reinstatement. However, the DOL regulations do not clearly state which party has the burden of the proof when an employer defends against a denial of reinstatement by asserting one of these limitations and the federal appeals courts are divided on this issue.

### ***Burden of Proof for Failure to Reinstate***

The regulation at issue in this case, 29 C.F.R. §825.214, addresses an employee's right to return to work following FMLA leave and states that "if the employee is unable to perform an essential function of the position because of a physical or mental condition, including the continuation of a serious health condition, the employee has no right to restoration to another position under the FMLA." Although the text of this regulation is ambiguous with respect to the parties' respective burdens, the Ninth Circuit held that it is clear from other regulations that the burden rests with the employer to establish whether the employee can perform the essential functions of the

job. Thus, the employer has the burden of showing that it had a legitimate reason to deny the employee reinstatement and the trial court's contrary jury instruction was erroneous.

The Ninth Circuit also held that the trial court erroneously instructed the jury that Sanders was required to prove that the City did not have "reasonable cause" to deny her reinstatement. The court noted that the DOL regulations interpreting the limitations on an employer's obligation to reinstate an employee include no reference to a "reasonable cause" standard. The Ninth Circuit held that by adding a reasonable cause requirement as an element of Sanders' reinstatement claim, the trial court's instruction permitted the jury to assess the City's overall response to Sanders' complaints rather than directing the jury to consider the specific reasons under DOL regulations why the City refused to reinstate Sanders to her former position after taking FMLA leave. The court held that this approach is contrary to the FMLA. Further, the court held that this instruction was not harmless because it added an unnecessary element to Sanders' burden of proving her FMLA reinstatement claim.

Accordingly, the Ninth Circuit vacated the judgment on the jury's verdict and remanded the case for a new trial.

### ***What This Means for Employers***

The effect of the court's decision in *Sanders* is that when an employer seeks to establish that it had a legitimate reason to deny an employee reinstatement, the employer must be prepared to prove the employee had no right to be reinstated. This is true even though the right to reinstatement from FMLA leave is not absolute. Unlike FMLA discrimination or retaliation cases, which apply the type of burden shifting framework recognized in *McDonnell Douglas v. Green* to evaluate such claims, employers in FMLA interference and reinstatement cases are at a disadvantage in the Ninth Circuit because they carry the ultimate burden of proof that the employee was not entitled to reinstatement. Thus, employers considering discharging an employee who has taken FMLA leave must ensure that the legitimate business reason for the discharge is clear and adequately documented.

If you have any questions regarding this decision or the requirements of the FMLA, please contact the author of this Alert, [Angela M. Quiles](mailto:Angela.M.Quiles@fordharrison.com), [aquiles@fordharrison.com](mailto:aquiles@fordharrison.com), an attorney in our Los Angeles office, or the Ford & Harrison attorney with whom you usually work.

[1] The DOL amended its FMLA regulations effective January 16, 2009; however, the regulations discussed by the court were virtually unchanged in substance. Because the events in this case took place prior to the effective date of the amendments, the court cited the 2008 FMLA regulations.