

BURR ALERT

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Expanding Eligibility: Is Your FMLA Policy Ripe for Misinterpretation?

INTRODUCTION

Can the wording in your handbook make employees otherwise ineligible for FMLA leave eligible? The Sixth Circuit (which has appellate jurisdiction over district courts in Kentucky, Michigan, Ohio and Tennessee) has answered this question in the affirmative, and employers everywhere must take heed and review their FMLA policies.

TILLEY V. KALAMAZOO COUNTY ROAD COMMISSION

Tilley v. Kalamazoo County Road Commission, 777 F.3d 303 (6th Cir. 2015), arose because Terry Tilley failed to complete several job assignments in a timely manner. On the morning that Tilley was supposed to complete his final assignment, Tilley claimed that he thought he was having a heart attack and had a coworker drive him to the hospital. As a result of his hospital stay, Tilley never submitted the final assignment.

Following his absence, the Road Commission sent Tilley FMLA paperwork including a cover letter and a "Notice of Eligibility and Rights & Responsibilities," which both stated that Tilley was eligible for FMLA leave. The Road Commission then terminated Tilley for failing to complete his assignments in a timely manner. Tilley filed suit claiming that, among other things, the Road Commission had interfered with his right to take FMLA leave. Tilley argued that had he known he was not FMLA eligible, he would have finished his assignment rather than go to the hospital for his suspected heart attack.

Generally, protection under the Family Medical Leave Act ("FMLA") extends only to employees who are "eligible" as defined by the statute. To be eligible, an employee must have worked for the employer for at least 12 months, worked at least 1,250 hours for the employer during the 12 month period immediately preceding leave, and worked at a location where the employer had at least 50 employees within 75 miles. The FMLA clarifies that for the 50/75-Employee Threshold, the number of employees is determined at the time the employee gives notice of the need for leave. 29 C.F.R. § 825.110(e). The Sixth Circuit readily concluded that Tilley was ineligible for FMLA leave, because the Road Commission employed less than 50 people within 75 miles of Tilley's workplace when he requested FMLA leave. In fact, the court unequivocally stated that "as a matter of law, Tilley was not an 'eligible employee.'"

Nevertheless, the Sixth Circuit went on to find that Tilley had an FMLA claim anyway. While Tilley was unquestionably ineligible for FMLA leave, the Sixth Circuit applied the doctrine of "equitable estoppel" to find merit in Tilley's otherwise groundless claim. The court noted that in certain circumstances, equitable estoppel works to prevent employers from raising non-eligibility as a defense where the employer has made statements about an employee's FMLA eligibility.

Unfortunately, the Road Commission's Personnel Manual failed to include the 50/75-Employee Threshold requirement, which the court found to be a clear misrepresentation as to Tilley's eligibility for FMLA benefits. The Manual simply stated that "Employees covered under the Family and Medical Leave Act are full-time employees who have worked for the Road Commission and accumulated 1,250 work hours in the previous 12 months." In the court's estimation, this was an unambiguous statement that Tilley was eligible, on which Tilley reasonably relied.

The court did note that there were "obvious reasons" to discredit Tilley's claim that he would not have gone to the hospital for his suspected heart attack had he known that he was not FMLA eligible. Nonetheless, the court found that the question of Tilley's credibility was one for the jury. In determining that a reasonable person in Tilley's position could believe that he was FMLA eligible, the court further noted that the Road Commission had sent Tilley two communications stating that he was FMLA eligible.

LESSONS LEARNED

If nothing else, *Tilley* is a stark reminder to review the FMLA policy in your employee handbook. As a starting point, the FMLA requires employers to give employees notice of their rights under the FMLA. Specifically, the Department of Labor requires employers to display a poster notifying employees of the FMLA's provisions. Covered employers must also provide a general notice containing the same information included in the poster in their employee handbooks.

Accordingly, your handbook should include a clear statement of which employees are eligible for FMLA leave. The Department of Labor's poster provides the following language on eligibility requirements: "Employees are eligible if they have worked for a covered employer for at least 12 months, have 1,250 hours of service in the previous 12 months, and if at least 50 employees are employed by the employer within 75 miles." In *Tilley's* wake, employers would be wise to include this language in their FMLA policies and notices.

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