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Labor & Employment Practice Group

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Does Substance Abuse Qualify for FMLA?

Some may be surprised to find the answer is yes, provided certain criteria are met. However, a federal judge in Connecticut recently issued a decision that shows the FMLA card can't be played in every case where illegal drug use is involved.

An employee in a position designated as "safety sensitive" by the Connecticut Department of Labor failed a random drug screen by testing positive for marijuana, and pursuant to the employer's policy, was suspended until he had a clean test. However, he failed a second test, and then was found to have used a product that masked the result of a third. Although he was asked to take yet another test, he went home instead. Thereafter, he was terminated.

He sued, alleging violations of both the interference and retaliation provisions of the FMLA. The judge said that "substance abuse" qualifies as a serious health condition that triggers FMLA rights, but only if the employee is incapacitated and is receiving a regimen of continuing treatment. An employee who simply tests positive for pot is not "incapacitated" just because DOL won't let him perform the duties of a safety-sensitive position, and is not receiving "continuing treatment" just because he takes multiple drug tests. It was undisputed that the employee never sought professional treatment.

He also alleged that his firing constituted retaliation for exercise of his FMLA rights, citing the fact that his employer sent him FMLA paperwork after he failed his first test. However, the judge said the employer's willingness to grant leave if the employee qualified for it didn't confer on him FMLA rights to which he wasn't otherwise entitled. Since he didn't have any FMLA rights to exercise, his termination couldn't constitute retaliation for exercising them.

It is worth noting that the employee in this case didn't use illegal drugs on the job, and didn't show up for work while impaired as a result of substance abuse. Violation of employer rules against such conduct generally constitutes grounds for discipline or discharge, even if FMLA rights would otherwise apply.

Our opinion is that whether or not FMLA applies, an employer should make a reasonable effort to work with an employee who is trying in good faith to beat a drug problem. However, an employee who uses illegal drugs which affect his ability to do his job safely and efficiently, and who makes no effort to get appropriate treatment, doesn't deserve the same consideration.

Workers' Comp Exclusivity Has Few Exceptions

Almost any injury on the job is covered by the workers' compensation system, and while there are a few situations where an injured employee can sue for damages outside that system, the courts tend to interpret them narrowly. Two recent cases in Connecticut courts illustrate this point.

One involved a FedEx worker who fell into a gap between a parked truck and a loading dock. He brought a lawsuit claiming the workers' comp exclusivity principle did not apply because of the "motor vehicle" exception and the "substantial certainty" exception. The court said the motor vehicle exception only applies when a co-worker is negligent in the operation of a motor vehicle. Even assuming a co-worker had not parked the truck close enough to the loading dock, since the truck was parked at the time of the accident, the co-worker was not operating the vehicle when the injury occurred, so that exception did not apply.

The injured worker also argued that the configuration of the FedEx loading system made it impossible to park trucks flush against the loading dock, and claimed that FedEx had intentionally created a dangerous situation where an injury was substantially certain. However, the court said the plaintiff had not presented any evidence that any other employee had ever been injured because of this situation, and neither the plaintiff nor any co-workers had brought the allegedly dangerous situation to the attention of FedEx management. The court said neither the plaintiff nor FedEx was aware that injury was a "substantial certainty" under these circumstances, and dismissed his claim.

The other case was brought by an Enfield teacher who was injured when an unruly student struck him with a backpack. He sued the school's principal, who was present during the incident and who had previously declined to discipline the student when the teacher complained about him, and claimed the principal had recklessly created a condition where an injury was likely to occur.

The court said that the principal could only be sued for an injury if his conduct was "willful or malicious," i.e. that he intended to injure the teacher, or intentionally created a condition that made it substantially certain that the teacher would be injured. It found no evidence to support that conclusion in this case. As in the FedEx case, the plaintiff's claims were dismissed.

Our advice to employers is to vigorously contest efforts by an employee to circumvent the workers' compensation system, unless one of the statutory exceptions is clearly applicable. After all, the legislative intent in adopting the system was to avoid the need for litigation to resolve workplace injury cases, and that is why employers are required to purchase workers' comp insurance.

Are Two-Tier Benefit Systems Discriminatory?

Here's an interesting question. Let's say you're an employer who (like many others) has decided your employee benefit costs are unsustainable. You address the situation by adopting, or negotiating with the union that represents your employees, a less costly benefit for recent hires. For example, you require employees who are not yet vested in your pension plan to work longer before earning a full retirement benefit, or qualifying for retiree health insurance, or you limit annual vacations to three weeks except for those who have already qualified for a greater amount of leave. Let's also say your more recent hires happen

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to be more diverse than more senior employees, because there are more females or minorities. Does your new policy make you vulnerable to an employment discrimination claim?

Of course, almost anyone can sue for alleged discrimination, but a recent federal court ruling in a Norwalk Board of Education case indicates that plaintiffs in circumstances like the ones described above may have an uphill fight.

A black custodian claimed that a 2013 change in Norwalk's retirement plan favored more senior (and more predominantly white) employees by phasing out richer benefits for early retirees. The judge found that there was enough statistical disparity between black and white custodians in the affected and unaffected employee groups to establish a *prima facie* case of disparate impact discrimination against African Americans.

However, employers can defeat such claims by showing that the policy at issue is "job related for the position in question and consistent with business necessity." The judge said that Norwalk's argument that the change was driven by economic constraints and the need to offset the cost of rising wages "seem like good faith reasons to me." He also noted that the plaintiff had failed to show that there were other ways to achieve comparable savings without adverse impact on minority groups.

Interestingly, the benefit change in the Norwalk case was negotiated with an AFSCME local union whose leadership and members were predominantly African American. However, the judge said that didn't insulate the City from a discrimination claim, because the union wasn't a defendant, and because minorities can theoretically discriminate against their own. However, it's hard to believe the union's agreement to the change didn't work in the City's favor.

Our opinion is that virtually all employers, both public and private, are going to have to deal with the need to trim expensive employee benefits, if they haven't done so already. Since the makeup of many workforces tends to change over time, there will sometimes be scrutiny of actions that impact different employee groups in different ways. However, clear evidence of financial justification for a change, together with the absence of evidence of intent to discriminate, will usually protect an employer from liability.

"Assistant Managers" Often Misclassified

Connecticut-based LAZ parking is facing the prospect of a collective action by assistant managers in various states who are classified by LAZ as exempt from overtime, but who allege that their duties do not qualify them for that status. They claim they should be entitled to overtime pay just like other non-exempt employees. It is not clear how many assistant managers might be eligible to join this suit, but LAZ reportedly has over 10,000 employees.

Regardless of whether or not the case has merit, it is a reminder to all employers that exempt classification for FLSA purposes is not just a matter of title; in fact titles by themselves carry little or no weight. Sometimes an "assistant manager" is simply an hourly worker who occasionally covers for the boss when he or she is out. The lead plaintiff in the LAZ case, for example, alleges his primary duties are parking cars and performing valet service.

Employers should be aware that in order for managerial status to

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qualify for the overtime exemption, the employee must meet the same tests as an executive. In addition to satisfying the salary test, his or her primary duty must be management of the enterprise or a part thereof, he or she must regularly direct the work of at least two other employees, and have authority to hire and fire or effectively recommend the same. While a manager may also perform non-exempt work, normally that occurs only when he or she decides it's appropriate, and retains responsibility for the success of the operation while doing so. Obviously, these are fact-specific determinations.

Our advice to employers is to periodically review the exempt or non-exempt status of its employees to assure there are no significant legal risks as a result of possible misclassification. In case of doubt, consult a knowledgeable lawyer or HR expert to see whether the exempt classifications pass the "sniff test." In close cases, it's usually less expensive to change the classification than to defend a lawsuit, especially a class action.

Legal Briefs
and Footnotes

Now that takes brass! A group of part-time nurses who work for Connecticut's Department of Developmental Services have filed a class action lawsuit demanding double time pay for working overtime. They are relying on a provision of their union contract that says employees who are "mandated to work overtime … shall be compensated at a rate double his/her hourly rate." That seems clear enough, but here's the catch. The part-timers in question are seeking double time not just for hours over 40, but for any hours beyond what they are usually scheduled to work. They claim there are "thousands" of potentially affected nurses, most of whom have straight time pay of $25 to $40 per hour.

Injury after emergency call: This spring we reported on a police officer who got workers' compensation benefits for an injury suffered when he bent down to pick up keys he had dropped while unlocking his car on the street on front of his house. Now a Middletown public works employee has been awarded benefits after an early morning car accident while he was returning home from a snow removal assignment. The City cited the "coming and going" rule, which denies workers comp to most employees during their commute. However, the Compensation Review Board said the "emergency call" exception applied, especially since the accident resulted from the same snow and ice that had precipitated the employee's late night call to work.

Don't look the other way: A high school principal in Stamford was terminated after failing to take any action despite receiving multiple reports of a possible sexual relationship between a teacher and one of her students. She took the matter to court, but the judge ruled that her failure to question either the teacher or the student, failure to report the matter to the Department of Children and Families or the police, and failure to take any other action to protect the student, constituted moral misconduct, among other grounds for termination.

No English? No problem: After injuring his back while unloading a truck, a laborer applied for permanent total disability benefits from the Compensation Review Board. He presented testimony from an expert who said that his inability to speak English impeded his employability. The employer's expert, however, cited several jobs where limited English skills were not a disqualifier. The Board credited the latter testimony, and also noted that the claimant could converse in simple English and had the cognitive ability to improve his language skills. The Board awarded permanent partial disability benefits, based on the claimant's inability to sit for long periods.