

The Continuing Evolution of FMLA Leave

By Geoffrey M. Boodell

Recently, the Ninth Circuit Court of Appeals delivered a timely reminder to employers on the importance of properly designating leave under the Family Medical Leave Act (**FMLA**) and the significant consequences for interfering with the employee's statutory rights under FMLA. In *Liu vs. Amway Corporation*, the court sided with an employee who claimed that her employer violated the FMLA by denying and mischaracterizing her FMLA leave and subsequently using her leave as a factor in the decisions to terminate her as a part of a reduction-in-force (**RIF**).

FMLA Refresher: The FMLA creates two interrelated substantive rights for employees. First, it grants a qualified employee the right to take up to twelve weeks of leave for various enumerated situations. Second, it provides an employee the right to be restored to his or her original position or a position equivalent in benefits, pay and other conditions of employment upon return from leave. The FMLA also provides that *"it shall be unlawful to interfere with, restrain, or deny the exercise of or the attempt to exercise, any right provided under this chapter."*

Reported Facts: Amway employed Liu as a scientist. She was the most experienced member of her department, which consisted of four scientists. About five months after she was hired she began reporting to a new supervisor and, after a few months, she went on maternity leave with a scheduled return-to-work date. A few weeks before Liu was scheduled to return, her supervisor telephoned her to inquire whether she would be returning to work on the scheduled date. Liu responded by requesting a leave extension because she had been experiencing fainting spells and fatigue, and felt she needed more time to recover from childbirth. Liu's supervisor immediately denied her request. About one week before she was scheduled to return, Liu met with her supervisor and again requested additional time to "recover from my pregnancy and bond with my baby." Her supervisor denied her specific request, but did grant her a short extension. Following this meeting, the supervisor transferred Liu from pregnancy leave status to a personal leave of absence. Liu then decided to travel to China to provide needed care for her terminally ill father, and to continue caring for and bonding with her newborn. Liu telephoned her supervisor and asked for another extension. The supervisor once again refused. Liu then called the Human Resources Department, explained her situation, and was told that a member of Human Resources would speak with her supervisor. A few days later, her supervisor telephoned her and granted her a one-week extension.

In the same time frame, the supervisor was informed that the company would be experiencing a RIF and that Liu's department would be merging with another. He was also told that at least one position in the department would be laid off. The supervisor and two other employees were to be the central decision-makers as to who would be eliminated. The supervisor then called Liu into the office while she was still on leave to review her annual performance evaluation. The supervisor rated Liu at the bottom of her department, which was dramatically different from her previous evaluation by her former supervisor. The evaluation score was based on a number of subjective criteria, which included various *"soft skills"* that the supervisor explained could *"not be taught,"* such as *"being upbeat"* and understanding *"what motivates team members."* While still on leave, Liu's position was eliminated based on her evaluation score as part of the planned RIF.

Rulings by the Courts: Liu sued Amway, in part, for denying and mischaracterizing her FMLA leave and using her leave as a factor in the decision to eliminate her position. Amway moved for summary judgment before trial. Liu claimed that by repeatedly denying her requests for extensions and requiring her to reduce her leave time, Amway interfered with her rights under FMLA. Amway argued that regardless of whether the supervisor actually granted her extensions, Liu in fact received the entire amount of leave she requested because she was still on leave when she was terminated. The trial court found Amway's arguments persuasive and further concluded that Liu could not establish that her termination as part of a legitimate RIF was a pretext for discrimination or retaliation.

On Appeal, the Ninth Circuit reversed that decision in its entirety. The Court held that “*personal leave*” subjected the employee to control and discretion of her supervisor while FMLA was a statutory right, and Amway thus interfered with her FMLA rights. The Court also reiterated its position that the *McDonnell Douglas* burden-shifting scheme did not apply to the anti-interference provisions of the FMLA. According to the Court, an employee who alleges that her employer interferes with rights under the FMLA merely has to show that FMLA protected leave constituted a *negative* factor in the termination decision. This is a significantly lower burden than required in a discrimination claim brought under Title VII or Washington’s Law Against Discrimination, which require evidence that the protected activity or characteristic was a *motivating or substantial* factor for the adverse action.

The Court was equally unimpressed with Amway’s claim that Liu’s termination was warranted because she received a substantially lower score on her performance review. The Court held that subjective evaluations that trigger terminations are particularly susceptible of abuse and more likely to mask pretext. Because the same supervisor who denied the FMLA leave also gave her a low rating, which was inconsistent with her prior ratings, the Court reversed the lower court’s ruling and remanded that issue for trial as well.

How Should Employers Respond to This Decision?

- The lesson in *Liu* is clear: Employers may be held strictly liable for personnel decisions that implicate an employee’s rights under the FMLA. An employer’s good faith or lack of knowledge that its conduct violates the FMLA does not protect it from liability.
- Employers should instruct employees how to properly request FMLA or other forms of protected leave through the Human Resources Department, instead of through supervisors.
- If an employee indicates that time-off is necessary, promptly determine whether FMLA leave is appropriate (*the employee need not specifically request FMLA leave*). Next, determine when the right to FMLA leave arises based on information gathered from the employee, and in some instances, his or her physician. Finally, notify the employee of his or her FMLA entitlement.
- If an employee is selected for a RIF while on FMLA leave, carefully screen the selection criteria and question the decision-maker to ensure that the FMLA leave does not have a negative impact on the termination decision. If in doubt, be sure to consult with legal counsel.

This Employment Law Note is written to inform our clients and friends of developments in labor and employment relations law. It is not intended nor should it be used as a substitute for specific legal advice or opinions since legal counsel may be given only in response to inquiries regarding particular factual situations.



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