

Clemency, Forbearance and the Impact of Failing to Follow Your Attendance Policies in Disability Cases

Jan 08 2008

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Employers have a significant interest in managing employee use of leaves of absence and sick leave. While leaves offer some benefits for both employees and employers, the use and abuse of leave time can affect workplace morale and present added costs for employers through overtime and lost productivity. Based on these concerns, employers often have policies and procedures to control and monitor requests for leave and the use of leave. Those policies and procedures, however, are not set in stone and must be applied according to the demands of the law.

In *Stoughton Trailers, Inc. v. LIRC*, 2007 WI 105, 735 N.W.2d 477, the Wisconsin Supreme Court recently based discriminatory motive, in part, on an employer's failure to follow its no-fault attendance policy when monitoring sick leave use. The Court found the employer could not claim whatever protection the no-fault attendance policy might provide based on the employer's failure to follow its policy. Additionally, the Court determined that the employer failed to offer "clemency and forbearance" in the enforcement of its policy as a reasonable accommodation, since the employer was aware the employee was seeking medical intervention to address and mitigate the effects of his condition.

I. Applicable Facts

Stoughton Trailers terminated an employee, who suffered from migraine headaches, for violating the employer's no-fault attendance policy. Stoughton Trailers' policy prohibited employees from accumulating more than six absences, unless the absence qualified under a limited exception, such as protected leave under the Family and Medical Leave Act. Under the policy, an employee who is absent from work due to a medical condition is provided a standard letter with a Family and Medical Leave Act form to complete and return. The employee has fifteen days to provide the supporting documentation.

The employee's migraine headaches, which were recently diagnosed and for which he was undergoing treatment, prevented him from working for approximately one month before his termination. For this one-month absence, the employee provided Stoughton Trailers with medical documentation of his headaches for this time period, but he did not submit the FMLA form. In accordance with its no-fault attendance policy, Stoughton Trailers assessed the employee one occurrence for the absence, which brought his total to 5.5 absences under the policy.

Following his return from his extended leave, the employee called in sick to work for three days. Upon his return to work, Stoughton Trailers provided the employee with the form letter informing him that he would need to submit a completed FMLA form within fifteen days to avoid an additional occurrence under the no-fault attendance policy. The employee provided two notes from his physician indicating his migraine headaches caused his absences for two of the three days. As a result, Stoughton Trailers assessed the employee an occurrence for the unexcused absence and terminated his employment that same day for accumulating 6.5 occurrences under its no-fault attendance policy. The termination decision was made only two days after the employee received the letter informing him that he had fifteen days to provide supporting documentation, and the employer knew the employee was meeting with his treating physician in one week for a follow-up examination to evaluate his treatment progress.

The employee filed a discrimination complaint. The Labor & Industry Review Commission (LIRC) found that Stoughton Trailers terminated the employee based on his disability and that Stoughton Trailers failed to accommodate the employee's disability. Stoughton Trailers appealed.

II. Legal Analysis

The Wisconsin Supreme Court upheld LIRC's and the court of appeals' decisions favoring the employee. The Court found that the employee was fired because of his disability based on Stoughton Trailers' failure to follow its no-fault attendance policy. Specifically, Stoughton Trailers did not follow its own no-fault attendance policy in terminating the employee when it failed to provide him with fifteen days to provide documentation in order to avoid being assessed an "occurrence." Because Stoughton Trailers did not follow its policy, it could not claim whatever protection that policy might provide in its termination of the employee. Of more significant importance, the Court found that Stoughton Trailers' failure to follow its no-fault attendance policy could be used against Stoughton Trailers as evidence of the employer's discriminatory motive for terminating the employee.

The Court also found that Stoughton Trailers did not reasonably accommodate the employee by failing to provide "clemency and forbearance" from the policy by offering his physician the opportunity to explore treatment and accommodation options. According to the Court's holding, employers must exercise "clemency and forbearance" by not immediately terminating an employee when the employer is aware that the employee is seeking medical intervention addressing the condition causing the absences. "Clemency and forbearance" requires that an employer "forbear" by temporarily tolerating an employee's disability-related absences and to permit medical treatment which, if successful, will remove the difficulty in performing the job-related responsibility. "Clemency and forbearance," however, is not an open-ended requirement mandating that an employer indefinitely suspend its attendance requirements for the employee.

III. Practical Guidance

Many employers have policies and procedures applying standards regarding requests for leave, absenteeism, and submission of related medical documentation. The importance of the Supreme Court's analysis to the application of these policies and to the actions of employers engaging in the accommodation process is significant.

First, employers must comply with their policies—the rules the entity has said must be followed—when those policies can be applied in a manner that is not contrary to state and federal discrimination laws. The employer's failure to comply with those policies may be used as evidence of discriminatory motive against the employer. To set forth the best defense to discrimination claims, best personnel management practices demand that employers rely on and follow their policies to ensure uniform, nondiscriminatory application of their rules. Employers, however, must be prepared to deviate from strict application of those policies as part of the accommodation process when it is reasonable to offer "clemency and forbearance" under such circumstances.

Second, employers must be certain their policies are drafted and applied in a manner that is in compliance with state and federal discrimination laws. An even less-desirable scenario is created if following the employer's policy actually causes the violation of discrimination laws. An opportune time exists to update and revise employment policies now that plaintiff's attorneys, the courts and LIRC will place greater scrutiny on employer policies and procedures.

Third, when enforcing policies, employers should proceed with caution before assessing adverse employment action against an employee for possible disability-related infractions. Employers must carefully evaluate all adverse decisions to ensure such decisions do not run afoul of the discrimination laws.

Finally, employers must be prepared to offer temporary "clemency and forbearance" from absenteeism policies and other policies and job duties in order to allow those employees the opportunity to consider treatment options and accommodation options. "Clemency and forbearance" are not new concepts. Employers routinely explore offering "clemency and forbearance" when they engage in the accommodation process. Based on the statements of the Wisconsin Supreme Court, however, the decision regarding whether to offer temporary "clemency and forbearance" must now be given even more consideration as part of the accommodation process.

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