When Can I Contact Employees On FMLA Leave?

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Practice Area: Labor and Employment

In *O'Donnell v. Passport Health Communications, Inc.*, the Third Circuit reviewed a case in which a sales executive was discharged during her medical leave because she refused to sign a non-compete agreement for a new position she was negotiating to begin at the conclusion of her medical leave. In response, the sales executive filed suit alleging interference and retaliation in violation of the Family & Medical Leave Act ("FMLA"). The court found that the employer did not interfere with the executive's FMLA rights by requiring her to perform *de minimis* tasks associated with her job transfer while on leave. Additionally, the Court found that the employer had a legitimate non-discriminatory reason for terminating her employment: the employee had refused to execute the required non-compete agreement by the deadline that was provided prior to commencement of FMLA leave.

In September 2010, Passport Health Communications ("Passport") began a reorganization, which included consolidation of its sales force and elimination of O'Donnell's position. O'Donnell was encouraged to apply for a position in Passports' Tennessee location. On January 6, 2011, O'Donnell was informed that she would be required to sign a non-compete agreement to receive the Tennessee position. On January 10, 2011, O'Donnell refused to execute the non-compete agreement and continued attempting to negotiate for a higher salary. On January 19, 2011, O'Donnell sought treatment for anxiety and panic attacks and began FMLA leave, to continue through January 31, 2011. On January 21, 2011, O'Donnell and a Passport executive communicated by e-mail about the Tennessee position, continuing to negotiate her salary. At that point, O'Donnell informed the executive that she was on medical leave, and the executive indicated that they would work through Human Resources to continue negotiating the new position. On January 21, 2011, Human Resources reminded O'Donnell that she would be required to execute the non-compete agreement to receive the Tennessee position.

O'Donnell was required to accept or reject the offer, including execution of the non-compete agreement, by January 28, 2011. On January 27, 2011, Human Resources again reminded O'Donnell of the January 28 deadline, stating that Passport would assume that O'Donnell had elected to terminate her employment if the company did not receive the executed non-compete by January 28. O'Donnell failed to execute the non-compete and was informed after the close of business on January 28 that she was terminated.

The court found that Passport did not interfere with O'Donnell's FMLA leave by continuing to contact her to negotiate the new position during her leave. First, Passport required that O'Donnell execute her offer letter and non-compete agreement before she requested or initiated FMLA leave. Thus, O'Donnell knew she was required to execute these forms before invoking her FMLA rights.

The court held that Passport's contacts with O'Donnell during her FMLA leave were not improper. Passport's contact was limited to the status of O'Donnell's employment decision, the execution of the documents, and ongoing salary negotiations at O'Donnell's behest. Human Resources contacted O'Donnell solely to remind her that her position had been eliminated and that if she wanted to accept the new position, she was obligated to do so formally by signing the required forms in a timely manner.

The court found that these *de minimis* contacts did not require O'Donnell to perform work for the benefit of the company. Furthermore, they did not materially interfere with her FMLA leave. The court stated that "There is no right in the FMLA to be 'left alone' and be completely absolved of responding to the employer's discrete inquiries." Passport's contacts were aimed only at retaining O'Donnell as an employee. These contacts did not "in any way hamper or discourage O'Donnell's exercise of her right to medical leave or attempt to persuade her to return from her medical leave early."

O'Donnell's retaliation claims similarly failed because she was required to execute her non-compete agreement and offer letter before she invoked her FMLA rights. Additionally, failure to sign such forms constituted a legitimate, non-discriminatory reason for termination of employment.

Employers should remember that it is acceptable to contact an employee on FMLA leave if that contact is minimal. An occasional brief phone call to ask a question about those job duties being covered in the employee's absence will not interfere with exercise of FMLA leave. Similarly, Human Resources can contact the employee to check on return dates or possible extension of leave. It also is acceptable to contact the employee to negotiate terms or conditions of employment in order to assist in transitioning the employee back to work. As long as the contact is necessary or related to preserving the employee's position or facilitating return, the contact is justifiable as long as it is *de minimis*.

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