Your Monthly Legal Update – January 2008
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APPLICATION OF DISABILITY LAW TO ATTENDANCE POLICIES

Happy New Year everyone!!! Thought I would delve right into a sticky issue on the application of disability law to attendance policies, since this is an issue that frequently crops up. The following is what the Wisconsin Supreme Court has to say on the issue pursuant to ***Stoughton Trailers, Inc. v. LIRC, 2007 WI 105, __Wis.2d __, 735 N.W.2d 477 (July 17, 2007).***

Stoughton Trailers is a manufacture of semi-trailers. They had a no-fault attendance policy for their employees. The policy included a point based system under which employees are assigned "occurrences" for tardiness and absences, subject to limited exceptions, including absences related to State and FMLA laws. An employee would be terminated if he or she accumulated six "occurrences."

Under this policy, any employee who was absent from work due to a medical condition is provided a standard letter with a FMLA form to complete and return to Human Resources within 15 days. If the employee returns the completed form, then he or she will not be assessed an "occurrence". However, if the employee did not return the certification form within the allotted 15 days (but does submit other proof that the absence was for a medical condition), the employee is assessed one "occurrence" regardless of the duration of the leave. (Note: one would hope that if there were exigent circumstances not allowing the employee to respond within the 15 days that this also would result in no "occurrence" being held against the employee.)

The employee in this case, Geen, worked for Stoughton for 8 years until his termination on January 31, 1997 for accumulating an excess of allowed "occurrences" under the attendance policy. As of Dec. 11, 1996, Geen had accumulated 4.5 "occurrences" under the policy, none of which were due to disability. From December 12, 1996, through January 7, 1997, Geen was absent from work because of severe headaches. Geen was diagnosed as suffering from migraine headaches and depression. The company determined this leave of absence constituted Geen's first disability related "occurrence" per the attendance policy, bringing his total to 5.5 "occurrences."

Geen returned to work on January 8, 1997. On Friday, January 24, 27 and 28, 1997, Geen called in before his shift and reported he could not work because he had migraines. Upon returning to work on January 29, 1997, HR provided Geen with a standard letter explaining his need to submit a completed FMLA form within 15 days of the date of the letter in order to avoid having the absences counting as an "occurrence" under the no-fault attendance policy.

On January 30, 2007, Geen was examined by a physician who concluded that he had textbook migraines that increased after he was prescribed Paxil. He was taken off Paxil and prescribed Midrin, scheduled for a follow up appointment the following day and given a doctor's note that

he was being evaluated for migraines. Geen took this note immediately to HR. HR told him he needed to bring a doctor's note stating that he could return to work without restrictions. (Note: big red flag)

On January 31, 2007, Geen gave HR an additional note from his doctor indicating he had been unable to work on January 27 and 28th because of migraines but was now cleared to work without restrictions. The January 24th absence was not addressed so HR informed Geen that he was being assessed an additional "occurrence" for the 24th and thus was up to 6.5 "occurrences." Geen was given only two days prior to his termination and not 15 days as provided under the no fault attendance policy to submit an FMLA form to avoid being assessed an "occurrence." This error ultimately proved to be fatal to the employer.

HR also told Geen he had three days from the date of his termination letter to further appeal his termination, which he timely pursued. This appeal noticed the employer that his physicians were evaluating his headaches and would perform additional tests and change medications if the headaches persisted. The employer denied Geen's appeal.

The case went to a full hearing before the ERD. The ERD found that (1) Geen had a disability as defined by the WFEA; (2) his employment was terminated in part because of his disability; and (3) Stoughton had failed to reasonably accommodate Geen's disability.

This matter went through appeals before the LIRC, the Circuit Court, the Court of Appeals and ultimately before the Supreme Court. It was concluded that Stoughton terminated Geen because of his disability within the meaning of the WFEA, holding that the two "occurrences" caused by Geen's disability were sufficient to conclude that the termination was because of disability. It was further concluded that Stoughton did not reasonably accommodate Geen in that it failed to give him sufficient time to submit documentation to avoid being assessed an "occurrence" under its attendance policy, and it failed to exercise "clemency and forbearance" when it refused to temporarily tolerate the absences that were caused by his disability to allow medical intervention to take its course and potentially resolve the problem of Geen's absences.

At the time of this termination, this employer knew that Geen was receiving medical treatment for migraines when it terminated him, that Geen had recently been absent from work because of migraines, that Geen had been absent for several weeks from December 1996 to January 1997 with migraines, and that Stoughton provided Geen only three days to obtain a medical excuse for his final absence. This amounted to a termination based on disability because Stoughton did not properly apply its own policy. Thus, this termination was based "in part" on disability and was a viable claim.

What do we take away from this case? Employers better follow their own policies to the maximum benefit allotted to the employee. Employers better use the medical information they receive relevant to an employee's medical condition and apply clemency and reasonable forbearance to allow medical treatment to resolve the problem prior to imputing punitive measures. I am sure that this is common sense to all of us, but it does not hurt to evaluate someone else's error.