

Your Monthly Legal Update – May 2008
Article by: Attorney Dawn Marie Harris

FMLA INSURANCE PREMIUMS & RACE DISCRIMINATION – IRANIANS

Yet another month has gone by and it looks as if spring might finally be arriving. With that said, let's dig into yet another fun legal update.

FMLA insurance premiums

We all know that during any FMLA leave period, the employee is entitled to be maintained as if they were working relevant to health insurance benefits. Many of us are also aware that the FMLA allows an employer to pursue reimbursement for health insurance premiums if the employee does not return from the FMLA. However, this provision of the FMLA was recently not recognized in an unpublished appeal decision.

In *Port Edwards School District v. Reissmann*, 2007AP943, a school district employee went out on maternity leave and then resigned when she should have been returning back to work. In this instance, the School District sought to collect the premiums paid on her behalf during the maternity leave. Ultimately, an unpublished decision was issued denying the School District the ability to collect the premiums. Rule of thumb: while a statute may seem clear on its face that does not mean that a court will not subjectively make a different decision. When the courts make determinations that may be inconsistent with statutory and/or other law, they can independently determine that a decision should not be published. What does this mean to the practitioner? Weigh the price you are willing to pay for seeking reimbursement of health insurance premiums.

Race Discrimination – Iranians

In our global environment, the make up of our society is always changing. While there may not be many of Iranian ancestry here locally, things can change and so I thought it was worthy to point out that an employee of Iranian origin, can pursue a claim of race discrimination in addition to national origin discrimination. It should also be noted as to the way this court grappled with identifying who is a minority and who is not. Needless to say, the definitions provided in our rapidly changing society as to who is a minority and who in the majority are in a constant state of flux.

In *Abdullahi v. Prada USA Corp.*, 07-2489, a Court of Appeals analyzed issues involving those of Iranian descent. The case itself analyzes the lightness and darkness of certain ethnic groups, concluding that Iranians and Central Asians are generally regarded as white despite their actual skin color. I guess I did not know that, did you? Evidently, some Central Asians are indistinguishable in appearance from Europeans, or from Americans whose ancestors came from

Europe, while others (besides those from India), i.e. Saudi Arabians would rarely be mistaken for Europeans. Again, this is the opinion of the court; would you make this same assertion? Then an analysis is made that some Iranians, especially if they speak English with an Iranian accent (whatever that is), might, despite being light skinned, strike some Americans as sufficiently different looking and sounding from the average American of European ancestry to provoke hostility (note: are Americans currently measured by European descent and for how long will that be the standard?). Yet, this opinion goes on to analyze, hostility to an Iranian might also be based on the fact that Iran is an enemy of the United States. The court opined that it was important for the Plaintiff to make it clear as to whether her claim of discrimination was based upon politics or her being a member of a foreign race. This analysis evolved around Congress' intent to protect from discrimination identifiable classes of persons who are subjected to intentional discrimination solely because of their ancestry or ethnic characteristics, determining that such discrimination is racial discrimination and a violation of Section 1981 whether or not it would be classified as racial in terms of modern scientific theory. In this case the court determined that so long as this individual could prove that he or she was subjected to intentional discrimination because he or she was born an Arab, rather than solely on the place or nation of his or her origin, or his or her religion, he will have made out a sufficient case pursuant to Section 1981.

This case was interesting to me because it underwent an analysis I would hope none of us would make, as we are expected to be color blind in how we deal with our employees. The measure would appear to be based on the location of the claim of discrimination and how biases are measured for that area, including those provoked by political hatred. If you found this analysis confusing at best, you are not alone. It is clear that those determined to be of Arab descent will be fit into a protected class status. I do not recommend going into an analysis such as this as to how much Arab someone is or is not. The courts can do what we employers cannot.