

**FMLA LEAVE PROPERLY REJECTED BY EMPLOYER FOR EMPLOYEE
UNDERGOING GENDER REASSIGNMENT**

In *Sanders v. May Dep't Stores, Co.* (8th Cir., 83 EPD sec. 41,285), the Eight Circuit, a little closer to us here in Wisconsin, declared that an employer did not violate the federal FMLA when it granted an employee who was about to undergo sex reassignment surgery personal leave instead of FMLA leave because the employee never requested FMLA leave. The employee did not want to complete the medical certification properly required by this employer despite this employer informing him that he may be eligible on the basis of his diagnosis of gender dysphoria. The employer had a policy of personal leave, granting employees up to 13 weeks of leave. At the expiration of this type of leave this employee could return to work if a position was available, but his pre-leave position would not be held for him. The employee actually tendered a resignation to commence his unpaid leave and requested payment of severance at this time. The case was tried to a jury, which found in favor of the employer on this issue, who had reinstated this now female employee (after her surgery) to a different position but ultimately terminated her based on poor performance.

Key points from this case:

1. The employer made sure that it made it very clear that FMLA was an option to the employee who specifically rejected it and refused to provide medical certification - had medical certification been supplied he/she may have qualified for leave;
2. This employer had a well defined unpaid leave policy and the employee's actual resignation to go into this status without any guarantee of return to his prior position was clearly stated (far different from rights he/she would have had if the employee had requested FMLA);
3. Based on this controversial topic, it is unclear what might have swayed this jury, so you must be careful. We thought that this case was noteworthy in light of a federal court's willingness to back an employer in a situation where FMLA was very clearly offered repeatedly to an employee who rejected that offer and refused to supply medical certification to the Employer.