Your Monthly Legal Update – September 2008

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FMLA CASE

Well, I am drafting my first legal update for SHRM from my new office. Yes, I have opened my own law firm, here in the Exchange Building, Suite 415, to provide me greater opportunity for professional growth. My practice is still focusing on employment and labor law, it was just transported to a new location, so feel free to reach me at my new location by email or by phone. I am hoping that with less internal management time I will be freer to attend the monthly meetings as I have missed seeing all of you. As for my update on the case study that was used for our mini mock trial recently, we are still waiting for the Administrative Law Judge to issue a decision. I am hopeful that this will occur by the end of the year. It's funny, but these determinations do have a way of turning up in December. I promise to keep you updated.

With that said, it's time for me to provide you some interesting legal tidbits. I thought that the following case summary was interesting and disturbing at the same time. While this case is from Indiana, it is still within the Seventh Circuit, our federal circuit for Wisconsin. (*Peters v. Gilead Sciences, Inc*., 7th Circuit, 91 EPD sec. 43,264)

An employee in this case was initially approved for FMLA but then was replaced by another employee before his 12 weeks of leave expired as he was later found statutorily ineligible for FMLA benefits. In this instance, the employee had reaggravated a shoulder injury and underwent corrective surgery in December 2002. At that time the employee took what he believed to be 12 days of FMLA leave. The day after he commenced this leave, the employer wrote him a letter documenting that his FMLA leave had started and informed him of his right to retain his position with the company after his FMLA leave expired. The language in this letter to the employee was substantially similar to the employee handbook FMLA provision. The company handbook stated that an employee was eligible for family and medical leave once that employee worked at least 1,250 hours during the previous 12 month period. Neither the handbook, nor the letter, included the statutory FMLA language requirements that the employer must employ 50 employees working within a 75 mile radius. Interestingly, when this same employee took another medical leave in March 2003 for his shoulder, the employer now designated him as "key employee" and replaced him with another employee prior to the expiration of his leave. Though he was offered another position, the employee declined. The employee was terminated.

The employee filed suit alleging among other claims that his discharge violated the FMLA and he also pursued a state law promissory estoppel claim (a claim that he was unjustly mistreated based upon the misrepresentations of the company). The District Court in Indiana dismissed the FMLA claim due to statutory ineligibility and did not address the promissory estoppel claim. The court instead recharacterized the state claim as an equitable estoppel claim but held the employee failed to establish that he should be determined to be eligible for leave based on the representations of the employer. The employee appealed.

What is interesting about this case is that the employee conceded on appeal that he was not statutorily eligible for FMLA, however he continued to pursue his equitable estoppel claim. The Court of Appeals opined that even though the District Court had reclassified the state claim as an

equitable estoppel claim, that the employee was clearly bringing a claim for promissory estoppels. The Seventh Circuit held, Indiana recognizes this cause of action in the employment context, but the claim required proof that a promise was made with the expectation that the promisee (the employee) would reasonably rely on it, that the promise of the company reasonably induced reasonable reliance by the promise of a definite and substantial nature and that injustice can be avoided by enforcing this promise. The Court went on to review the company employee handbook which promised 12 weeks of medical leave, admittedly the equivalent of an FMLA leave. The handbook did not require the restriction that the employer must employ 50 employees within 75 miles. The Court then evaluated the letters granting the employee FMLA leave in conjunction with this handbook policy and found that the first four elements required to prove a promissory estoppel claim had been established based upon undisputed evidence. The fifth element, requiring an analysis as to an appropriate remedy was remanded back to the District Court for further consideration. The District Court was ordered on remand to consider whether the handbook and the letters were sufficient enough to establish a binding contract under Indiana law.

I noted this case because it should make everyone aware that once you draft a policy and then you document that a person qualifies for leave, you may very well be bound by your initial determinations. This is provided as a word to the wise.

With that said, I hope you all have a terrific month. Please call me if you have any questions.