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Courts Apply the Doctrine of Equitable Estoppel to Prevent Employers from Skirting Liability for their Actions Toward Otherwise Ineligible Employees

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Several federal courts have recently wrestled with the thorny issue of whether or not to apply equitable estoppel principles to extend Family Medical Leave Act ("FMLA") protections to otherwise ineligible employees. In most cases, these courts have acknowledged equitable estoppel may be appropriate in the FMLA context. The increasing recognition and application of this principle highlights the need for employers to review and revise their FMLA policies and procedures to ensure they are not inadvertently extending FMLA rights.

How Could Equitable Estoppel Apply in the FMLA Context?

The factual scenarios under which equitable estoppel principles may be applied in the FMLA context varies somewhat between various jurisdictions. However, the typical fact pattern is one in which an employee is provided FMLA leave by his or her employer at a time when the employer is mistaken about the employee's right to take the leave. Often, employers mistakenly believe the employee has worked 1250 hours in the last 12 months or that the employer has more than 50 employees within 75 miles of the requesting employee's workplace (the "50/75 rule"). In some cases, the employer's handbook or other policy statement specifies eligibility requirements for coverage that are less exacting than the requirements of the FMLA. The employee in this prototypical case then relies upon the employer's mistaken representation or overly-generous policy, requests medical leave, and then begins his or her leave. During the leave period, the employer realizes the employee is actually not statutorily-eligible for the leave and either terminates the employee or takes some other adverse action against him or her. The employee responds with a lawsuit claiming a violation of his or her FMLA rights and the employer defends the suit by claiming the employee is ineligible for the FMLA's protection. The employee then argues to the court that the employer is equitably estopped from relying on the employee's ineligibility because of the employer's mistakes or misrepresentations regarding the employee's eligibility.

The recent case of *Reaux v. Infohealth Management Corp.*, No. 08-C-5068, 2009 BL 48247 (N.D. Ill. Mar. 10, 2009) serves as an example of how these principles may be applied. In *Reaux*, the plaintiff requested FMLA leave for the impending birth of her child. She conceded in her complaint that she later learned her workplace had fewer than 50 employees within 75 miles, and therefore, she was statutorily not eligible for FMLA leave. However, Infohealth's employee handbook included a description of the eligibility requirements for FMLA leave under the company's policy that made no mention of the 50/75 rule. In addition, Reaux alleged that her supervisor told her that she would be eligible for FMLA leave if she filled out the proper paperwork, which she apparently did. Thereafter, she began the designated leave and gave birth to her child on August 1, 2006. She was slated to return to work on September 11, 2006; Infohealth terminated her employment on September 7, 2006.

When the employee filed her lawsuit, Infohealth filed a motion to dismiss, citing Reaux's ineligibility for FMLA coverage under the 50/75 rule. In denying the motion, the court found that Reaux had properly pled the requirements for asserting equitable estoppel – (1) a misrepresentation by her employer, (2) reasonable reliance by Reaux on that misrepresentation, and (3) detriment to Reaux occasioned by her reliance. In so finding, the court cited a string of Seventh Circuit decisions recognizing equitable estoppel may be applied in this context. The *Reaux* decision is part of a growing trend across the federal circuit courts and highlights the

dangers that lurk for employers oblivious to the importance of correctly managing their decision-making process regarding employees' requests for medical leave.

Survey of Federal Circuit Courts' Treatment of Equitable Estoppel in the FMLA Context

To date, no federal circuit court has refused to apply equitable estoppel in the FMLA context when presented with a compelling set of facts. Indeed, the Second, Fifth and Eighth Circuits have all explicitly accepted equitable estoppel arguments to prevent employers from relying upon an employee's statutory ineligibility in defending against these claims. *See*, *e.g.*, *Kosakow v. New Rochelle Radiology Assocs., P.C.*, 274 F.3d 706 (2d Cir. 2001); *Minard v. ITC Deltacom Commc'ns, Inc.*, 447 F.3d 352 (5th Cir. 2006); *Duty v. Norton-Alcoa Proppants*, 293 F.3d 481 (8th Cir. 2002). For example, in *Kosakow*, the Second Circuit prohibited the employer from arguing Ms. Kosakow was not statutorily eligible for her leave because she had failed to meet the required 1250 hours worked in the last 12 months under the FMLA. Kosakow had learned she needed surgery to remove a cancerous cyst in November 1996 and scheduled the surgery for January 1997. She requested and was granted medical leave for the surgery and recovery shortly after learning of the cyst. New Rochelle Radiology then terminated her prior to the end of her leave claiming the decision was part of a company downsizing.

The Second Circuit found that New Rochelle Radiology's failure to post the required FMLA notices regarding the FMLA's eligibility requirements was a silent, but affirmative, misrepresentation on which Kosakow conceivably detrimentally relied in falling just short of working 1250 hours before taking medical leave. The court based its decision in part on the fact that employers have an affirmative duty under the FMLA to inform their employees of their FMLA eligibility when an employee requests leave, and thus, the employer's silence as to her ineligibility served as an affirmative misrepresentation. In short, New Rochelle Radiology was foreclosed from relying on her statutory ineligibility in defending against her FMLA claim.

The Sixth and Seventh Circuits have stated that the doctrine may apply in the right factual scenario, but have yet to be faced with that situation. *Dobrowski v. Jay Dee Contractors, Inc.*, No. 08-1806, 2009 BL 145286 (6th Cir. Jul. 8, 2009); *Peters v. Gilead Sciences, Inc.*, 533 F.3d 594 (7th Cir. 2008). In *Dobrowski*, the Sixth Circuit found that it would be willing to apply the doctrine, but concluded Dobrowski failed to show he detrimentally relied on his employer's misrepresentations because he had scheduled his surgery before requesting leave.

The First, Third, Fourth, Ninth, Tenth and District of Columbia Circuits have yet to affirmatively weigh in on whether equitable estoppel is applicable in the FMLA context, but district courts in most of these circuits have applied the doctrine. *See*, *e.g.*, *Moore v. Czarnowski Display Service, Inc.*, 2009 BL 46479 (W.D. Pa. Mar. 6, 2009); *Blankenship v. Buchanan Gen. Hosp.*, 999 F. Supp. 832 (W.D. Va. 1998) (recognizes Fourth Circuit has yet to apply the doctrine, but applies it to deny summary judgment for employer); *Sutherland v. Goodyear Tire & Rubber Co.*, 446 F. Supp. 2d 1203 (D. Kan. 2006) (confirms Tenth Circuit yet to rule on issue, but applies doctrine to deny summary judgment to employer). The Eleventh Circuit declined to speculate whether it would apply the doctrine if the plaintiff could show he or she detrimentally relied on the employer's misrepresentation regarding the employee's FMLA status. *Brungart v. BellSouth Telecommunications, Inc.*, 231 F.3d 791 (11th Cir. 2000).

Potential Outcomes

The obvious and most harmful outcome for an employer deprived of an opportunity to rely on an employee's statutory ineligibility is that the company will be found liable for damages suffered by the employee as a result of his or her reliance on the employer's misrepresentation. The key factor in these cases is whether an employee can demonstrate he or she detrimentally relied upon the misrepresentation. Employers have often avoided the application of equitable estoppel

where they can show the employee was going to take medical leave regardless of whether it was properly designated as FMLA leave or not. The *Dobrowski* case is but one recent example of this phenomenon – the employer prevented the application of equitable estoppel by demonstrating Dobrowski had scheduled his elective surgery before requesting any leave.

However, the *Dobrowski* case also demonstrates that employers who are sloppy when it comes to managing medical leave requests are still likely to ring up large legal bills in defending against these claims. The employer in *Dobrowski* won on summary judgment, but, in so doing, was required to undergo the tedious and often prohibitively expensive process of discovery in the case. The same outcome is likely in the *Reaux* matter. Infohealth may very well be able to demonstrate on summary judgment that Reaux did not detrimentally rely upon Infohealth's misrepresentations because she needed medical leave to deliver her child regardless, but Infohealth is likely to pay its attorneys a good deal of money before obtaining that result. As *Reaux* demonstrates, sophisticated plaintiffs' counsel will easily be able to draft an employee's complaint in such a way as to survive a motion to dismiss and thereby increase the chances the employer will be willing to settle the plaintiff's claims. Thus, the key for employers is to take steps now to prevent these kinds of claims from surfacing in the first place.

Recommendations

The application of the equitable estoppel doctrine in the FMLA context should prompt all employers to exercise care when communicating with their employees regarding the employees' potential FMLA eligibility. At the same time, the FMLA requires employers to provide employees with notice of the employer's decision regarding an employee's FMLA leave request within five days of the making of the request. Employers are thus often scrambling to comply with this notice requirement, and therefore, increase their chances for inadvertently granting a leave request for an otherwise ineligible employee. In these situations, careful planning and proper training of supervisors and human resources ("HR") professionals is central to an employer's successful management of these leave requests.

First, employers must ensure that all written communications with their employees regarding the applicability of the FMLA or similar state and local laws do not inadvertently extend benefits to those otherwise ineligible. To that end, employers should review and revise on a regular basis their employee handbooks and any other written policy documents to ensure those documents do not overstate the universe of employees eligible for FMLA benefits.

Second, employers should adequately train their supervisory and HR personnel to correctly discuss leave requests. As a first step, it is best to centralize this function in the HR or Benefits department to limit the number of people who may inadvertently create FMLA liability for the company. Moreover, since the FMLA prohibits direct supervisors from contacting an employee's healthcare provider for any needed clarifications regarding a leave request, centralizing the function in the Human Resources or Benefits department serves an additional streamlining purpose. At the same time, direct supervisors should be trained to refer all employees to the centralized repository for FMLA and other leave questions and to not make any statements regarding their beliefs of whether or not the employee will qualify for FMLA leave. HR professionals must be trained to refrain from making any statements predicting an employee will be eligible for FMLA leave until the eligibility determination is completed. Lastly, employers should implement and/or revise their procedures to ensure the first item that is determined in responding to an FMLA leave request is whether the requesting employee meets the statutory requirements for eligibility. Having systems in place to quickly assess the requesting employee's length of service, number of hours the employee has worked in the past 12 months, and the number of employees within a 75 mile radius of the employee's workplace should increase the likelihood that employers can prevent the mistakes described above from occurring.

In the end, employers who are able to implement these relatively simple practices greatly reduce their chances of accidentally creating liability for FMLA leave for otherwise ineligible employees.

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