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Management Alert

Medical Leave – Is One Certification Enough?

The Supreme Court of California Provides Guidance On Medical Leave Certification And Working A Similar Job For Another Employer During A Medical Leave Of Absence

On April 7, 2008 the California Supreme Court handed down its opinion in *Lonicki v. Sutter Health Central*. In a fractured 3-3-1 decision, the Court held that an employer is not precluded from challenging an employee's serious health condition simply because the employer did not obtain a third opinion regarding the employee's condition. The Court also held that an employee's ability to continue to perform a similar job on a part-time basis for another employer following a request for leave is not conclusive evidence that the employee is able to perform the same work for the original employer.

The Claims

Antonina Lonicki was employed as a certified technician in a hospital's sterile processing department. Following a variety of departmental changes, and a change in her shift hours, Lonicki became too upset to work and went home. The director of Lonicki's department requested that she obtain medical authorization for her absence. When she contacted her primary care physician, Lonicki was told to meet with a family nurse practitioner, who concluded that she should be off of work for one month, and should begin seeing a therapist. Lonicki submitted a request for medical leave of absence.

In response to the request, the employer directed Lonicki to see an occupational health physician of its choosing. That doctor concluded Lonicki could return to work without restrictions. On the basis of this evaluation, the employer directed Lonicki to return to work or face dismissal.

Following a subsequent consultation with her primary care physician, and a referral to a psychologist, Lonicki advised the employer that she would remain out of work for another two weeks. The employer told Lonicki that she would be allowed to take a more limited period of paid time off, but she would not be provided with medical leave.

Lonicki then consulted a psychiatrist who concluded that she was "disabled by major depression" and that she needed to be off of work for one month from the date of examination. When Lonicki presented the employer with the psychiatrist's note, she was informed that

she had been terminated for failure to appear at work. Consequently, the plaintiff filed a lawsuit claiming the employer failed to comply with the California Family Rights Act (CFRA) (Cal. Gov't Code §12945.2) when questioning the validity of Lonicki's absence.

During the above period of time, Lonicki continued to work a similar, part-time job at another hospital.

Decisions By The Lower Courts

The trial court concluded that Lonicki's part-time job at another hospital during the period she was on leave "showed that she could perform the essential functions of her job" for the employer. The trial court granted the employer's motion for summary judgment. The Court of Appeal affirmed the trial court's ruling.

The Supreme Court's Decision

The Supreme Court granted review on two issues: (1) whether an employer's failure to invoke the CFRA's dispute-resolution mechanism (i.e., having a health care provider jointly chosen by the parties determine the employee's entitlement to medical leave) bars the employer from later claiming that the employee did not suffer from a serious health condition; and (2) whether a full-time employee's performance of a similar job on a part-time basis for another employer, during a period for which leave is sought, conclusively establishes that the employee is able to perform the job for the original employer.

Is An Employer Required To Invoke CFRA's Dispute Resolution Mechanism To Challenge An Employee's Claim Of Serious Health Condition?

The Supreme Court first noted that the language of the statute does not *require* an employer to seek a third medical opinion in the face of two conflicting opinions; instead, the language is permissive. The Court concluded that the language of section 12945.2(k)(1)(A)-(C) limits what an employer may require of an employee, but it does not require that an employer submit all disputes regarding an employee's entitlement to leave to a third health care provider.

Similar conclusions were reached in prior cases in which federal appellate courts were asked to construe virtually identical language contained in the Family and Medical Leave Act (FMLA) (29 U.S.C. § 2601 *et seq.*). See *Rhoads v. F.D.I.C.*, 57 F.3d 373 (4th Cir. 2001); *Novak v. Metrohealth Medical Health Ctr.,* 503 F.3d 572, 579 (6th Cir. 2007); *Stekloff v. St. John's Mercy Health Sys.,* 218 F.3d 858, 860 (8th Cir. 2000). These federal courts noted, "the FMLA provides only that an employer 'may' seek a second opinion, or third opinion... Because the term 'may' is permissive, the plain language of the statute indicates that an employer who questions the validity of a certification has the option of seeking a second and third opinion, without being required to do so."

The Court concluded that an employer is not barred from asserting that an employee fails to meet the statutory requirement of having a serious health condition rendering the employee unable to do her job merely because the employer chose not to seek a determination of a third health care provider when the first two opinions conflicted.

Does The Employee's Continued Performance Of A Similar Job During Medical Leave Conclusively Establish That The Employee Remains Capable Of Performing The Same Job For The Employer From Whom Leave Is Sought?

The second question considered by the Court was not resolved as favorably to employers. The Supreme Court held: "[w]hen a serious health condition prevents an employee from doing the tasks of an assigned position, this does not necessarily indicate that the employee is incapable of doing a similar job for another employer." As an example, the Court distinguished the stress incurred by an employee who works in the emergency room of a hospital that commonly treats a high volume of life-threatening injuries from that experienced by an employee working in an emergency room that sees relatively few such injuries.

The Court thus concluded that, simply because an employee is able to perform another job with similar functions, it does not *conclusively* follow that the employee lacks a serious health condition with respect to the position in question. The Supreme Court remanded the case to the Court of Appeal for further consideration in light of its holding.

What *Lonicki* Means For Employers

The *Lonicki* decision is a mixed victory for employers. The decision was split 6-1 on the first issue, and 4-3 on the second issue. An employer clearly is permitted to question the validity of an employee's medical certification based on a second opinion, without being requiring to obtain a third opinion. As noted by the Court, it is not even necessary that an employer obtain a second opinion. To defend a lawsuit brought by an employee claiming his or her CFRA rights were violated, however, an employer is well served by having at least one reliable medical opinion to which it can point as the basis for its decision to deny leave.

Even though an employer is not immunized from making a leave decision adverse to an employee on leave who is working a second, substantially similar job, a well developed factual argument may still prevail. Specifically, the Court noted that "plaintiff's ability, during the period when she was seeking medical leave from defendant employer, to work part time for a different hospital . . ., doing tasks virtually identical to those she claimed she was unable to perform for defendant, is strong evidence that she was capable of doing her full-time job . . . ."

If you have any questions regarding this Management Alert, please contact the Seyfarth Shaw attorney with whom you work, or any Labor & Employment attorney on our website, www.seyfarth.com.

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