Employer Reactions to Requests for FMLA Leave in the Eleventh Circuit– The Good, The Bad and The Ugly

By Lisa B. Golan

***Jones v. Gulf Coast Health Care of Del., LLC*, 854 F.3d 1261 (11th Cir. 2017)**

The Good: An activities director for a long term care facility requested leave under the Family and Medical Leave Act for rotator cuff surgery and recovery. His employer provided him with 12 weeks of FMLA leave and another 30 days of extended leave when the employee's doctor and physical therapist were not comfortable releasing him to return to work without restrictions.

The Court rejected Plaintiff's claim that his employer interfered with his right to FMLA leave by dissuading him from returning to work on light duty restrictions. While light duty work may be a reasonable accommodation under the Americans with Disabilities Act – the FMLA does not require an employer to provide accommodations to enable an employee to return to work.

The Bad: During his extended leave, the employee posted photos posing at Busch Gardens and the beach on his Facebook page. Within a month after the employee returned from leave he was suspended and then terminated allegedly because his Facebook photos demonstrated that he was abusing and misusing FMLA leave and could have earlier returned to work.

The District Court held that the more than 4 months between when Plaintiff's leave began and the date he was terminated was too long to show that his termination was caused by his leave. In reversing, the Eleventh Circuit held that "temporal proximity, for the purpose of establishing the causation prong of a prima facie case of FMLA retaliation, should be measured from the last [rather than the first] day of an employee's FMLA leave" and that one month was sufficiently close to raise "a genuine dispute as to whether [the employee's] taking of FMLA leave and his termination were casually related." The Court also found that Plaintiff's supervisor's "alleged comment that "corporate was not going to like the fact that [Jones] was taking FMLA leave during the 'survey window'" corroborated Jones's claim that his FMLA leave and his termination were not "wholly unrelated.""

To rebut this prima facie case of retaliation, Jones's supervisor asserted among other things that he was terminated because he missed physical therapy for the week he was vacationing (known by Gold Coast to be untrue before he was fired) and because his photos allegedly created a morale issue contrary to the company's social media policy (a claim not raised before his termination and not supported by the purpose of the social media policy which was to prevent negative postings about staff or facilities). The Court held that on this record "a jury could reasonably conclude that [Plaintiff's supervisor's] explanations are inconsistent, contradictory, and implausible" and remanded Jones case for a trial on the merits.

***Hicks v. City of Tuscaloosa*, 2017 U.S. App. LEXIS, 2017 WL 3910426, Case No. 16-13003 (11th Cir. 9/7/17)**

The Ugly: In *Hick*s, the Eleventh Circuit affirmed a jury verdict for Plaintiff on her Pregnancy Discrimination Act (PDA) and FMLA claims. The jury awarded Hicks $374,000 - reduced by the magistrate judge to $161,319.92 plus costs and attorneys' fees.

Hick's supervisor told Hicks more than once that she should take only 6 weeks of FMLA leave for the birth of her child, rather than the entire 12 weeks to which she was entitled and which she actually used. Although before this leave, her supervisor's review stated that Hicks "exceeded expectations," on Hicks' first day back, she wrote her up and Hicks was thereafter reassigned to a less favorable position and refused alternative duty requested to allow her to breastfeed. The jury concluded that the City's actions constituted discriminatory discharge.

The jury was possibly swayed by the supervisor's admission that she called Hicks a b****, by Hicks testimony that she overheard her supervisor calling her a b**** and telling their new Captain that she would find a way to write Hicks up and get her out of there, and another officer's testimony that he overheard the supervisor talking loudly about Hicks saying "that stupid c*** thinks she gets 12 weeks. I know for a fact she only gets six." It sounds like the City would have benefitted from the EEOC's new training program on respectful workplaces.

Per the Eleventh Circuit: "The evidence taken in the light most favorable to Hicks provides ample evidence that Hicks was both discriminated against on the basis of her pregnancy and … retaliated against for taking her FMLA leave. Multiple overheard conversations using defamatory language plus the temporal proximity of only eight days from when she returned to when she was reassigned support the inference that there was intentional discrimination."

The Eleventh Circuit also found that a plain reading of the PDA supports the finding that it covers discrimination against breastfeeding mothers.