

February 2017

## FEDERAL DISTRICT COURT'S TREATMENT OF AN EMPLOYER'S FMLA OBLIGATIONS ENDS IN A DRAW

*By: Janelle Edwards-Stewart*

Have you, as an employer, created your own Family Medical Leave Act ("FMLA") forms for employees to complete when seeking leave? Do you expect that your employees should be keeping track of their FMLA leave, since "anyone can count from one to 12 weeks, right?" If you answered "yes" to either or both of these questions, then you may end up where Youth Consultation Services ("YCS") found itself this past December, when a federal district court deemed it to have violated its notice obligation under the FMLA. Do not despair. In the same action, the Court declined expanding the company's disability accommodation obligations and, instead, made clear to employees that a FMLA leave request does not double as a request for disability accommodation.

### BACKGROUND

In the fall of 2012, former YCS nurse Janet Ross requested time off (until October 8) due to hip dysplasia -- a condition she claimed to have suffered from for nearly 15 years. Just before her leave expired, Ross submitted a doctor's note seeking additional leave time (from October 9 to October 23). On receiving this second leave request, YCS's Benefits Manager sent Ross a packet containing FMLA information and various forms created by YCS, including a "Family/Medical Leave Request Form," a "Leave Designation/Employee Acknowledgement of Obligations Form," and a "Certification of Health Care Provider Form."

Ross completed the Family/Medical Leave Request Form, indicating October 1, 2012 as the start date for her medical leave. She indicated that the end date for her leave was "unknown."

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The Leave Designation/Employee Acknowledgement of Obligations Form had been partially completed by the Benefits Manager before being sent to Ross. It included a notice to Ross that she was eligible for "up to 12 weeks" of FMLA leave, during which time her job would be protected. Notably, the form did not specifically state that Ross was eligible for the full 12 weeks, nor did it identify the 12-month period in which the leave would be calculated -- information that is specifically sought on the Department of Labor's ("DOL") approved forms. The Leave Designation/Employee Acknowledgement of Obligations Form required Ross to provide a status on her condition and notice of her continued intent to return to work every 30 days while on leave. It also warned that "Failure to return to work on the applicable return date may result in the termination of employment/you being considered to have voluntarily resigned." Ross signed and returned the form to YCS.

Finally, Ross's physician completed, or rather included certain information on, the Certification of Health Care Provider Form. The physician verified that Ross was then suffering from a serious health condition that prevented her from working intermittently during her leave. However, the doctor did not indicate whether Ross could perform some functions of her job or work part-time. The doctor also did not indicate when Ross might be able to return to work, recording Ross's anticipated return date as "undetermined." Both Ross and her doctor signed the form.

Roughly two weeks after YCS's Benefits Manager received Ross's packet, including the forms referenced above, Ross submitted another note from her doctor. This note indicated that Ross "was unable to work at this time" and was scheduled for two hip surgeries, which would occur on November 19, 2012 and January 21, 2013. This note also stated that Ross would be able to return to work on April 21, 2013.

Despite receiving Ross's doctor's note some time before October 26, 2012, YCS did not contact Ross about the note until December 31, 2012. On that day, YCS's Benefits Manager verified via telephone that Ross would not be returning to work until April 21, 2013. Following the call, the Benefits Manager issued a letter to Ross notifying her that her FMLA leave had "exhausted on December 21, 2012. As a result, [Ross's] employment will be terminated as of January 4, 2013." Ross was invited to apply for any open position within the company if and when her situation changed.

On April 8, 2014, Ross filed suit, alleging that YCS had violated both the FMLA and the New Jersey Law Against Discrimination ("NJLAD"). With regard to the FMLA, Ross claimed that YCS had failed to provide her with adequate notice that her absence for surgery until April 21, 2013 would cause her to exceed her 12 weeks of FMLA leave time. Ross argued that had she timely received such notice, she might have rescheduled her surgeries to avoid exceeding the 12-week limitation. With regard to the NJLAD, Ross alleged that YCS had failed to accommodate her disability. She argued that her request for FMLA leave had triggered YCS's obligation to initiate the "interactive process" for determining an appropriate accommodation.

## **DECISION**

The United States District Court for the District of New Jersey reviewed the matter. With respect to Ross's FMLA claim, the Court considered (1) whether YCS had provided Ross with adequate notice of her rights under the FMLA and, if not, (2) whether Ross had suffered prejudice as a result of YCS's deficient notice.

The Court promptly concluded that YCS had given its former employee deficient notice. The FMLA requires that three forms of notice be given to employees: (1) eligibility (notice that the employee is eligible to receive FMLA leave), (2) rights and responsibilities (notice to the employee of his/her specific expectations and obligations and an explanation of any consequences of failing to meet the expectations and obligations specified), and (3) designation (notice that the employer will designate the leave as FMLA-qualifying). The latter notice must generally be given within five business days.

The Court accepted Ross's argument that YCS had failed to provide her with adequate designation notice. Federal regulation states that "[i]f the information provided by the employer to the employee in the designation notice changes (e.g., the employee exhausts the FMLA leave entitlement), the employer shall provide, within five business days of receipt of the employee's first notice of need for leave subsequent to any change, written notice of the change." C.F.R. § 825.300(d)(5). The Court stated "[t]he burden of calculating time is on the employer, not the employee." It also acknowledged that YCS could not have "calculated against an unknown date," when Ross provided her October 2012 doctor's note. However, a few weeks later, when YCS received Ross's doctor's note that identified April 21, 2013 as Ross's anticipated return-to-work date, YCS should have noted the change and, within five business days, alerted Ross that she would exhaust her FMLA leave and be subject to termination, were she to maintain April 21, 2013 as her return-to-work date. Since "YCS failed to fully inform Ross of her FMLA rights when it was in possession of all necessary information to do so[,] Ross suffered prejudice because she did not have the opportunity to structure her leave differently and save her job." The Court granted Ross summary judgement on her FMLA claim.

However, the Court rejected Ross's claim that YCS had failed to engage her in the interactive process and accommodate her disability. "The reasonable accommodation process begins with a request by the employee for an accommodation that will allow him or her to perform the essential functions of the job." *After* receiving such notice, the employer must initiate the informal interactive process with the employee.

While Ross argued that her request for FMLA leave made clear to YCS that she was in need of a disability accommodation, the Court reasoned that "there are many reasons an employee may exercise her leave," and Ross had "overlooked the requirement that the employee must ask for an accommodation." The Court found no evidence that Ross had, by any means, alerted her employer to her need for an accommodation. It granted YCS summary judgement in connection with Ross's NJLAD claim.

## **TAKE AWAYS**

In general, employers are better served by utilizing the DOL's approved forms in addressing FMLA leave requests. Whenever an employer receives paperwork or information which suggests that its employee's leave end date is unknown -- a relatively common occurrence -- the employer is not excused from its obligation to provide timely notice to the employee regarding his/her used and available leave time. This is especially true if the employer later on obtains leave end date information. At the same time, receiving a FMLA leave request does not trigger an obligation to initiate the interactive process. Employees are still required to request disability accommodations.

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