



LABOR & EMPLOYMENT DEPARTMENT

ALERT

THIRD CIRCUIT SCALES BACK THE POOL OF EMPLOYEES COVERED BY THE FAMILY MEDICAL LEAVE ACT

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Last month, the Third Circuit Court of Appeals issued a decision, in *Sinacole v. iGate Capital*, (3d Cir., No. 07-1141), which has significant implications for every employer subject to the Family and Medical Leave Act (FMLA). There, the Court invalidated a Department of Labor (DOL) regulation which deemed an employee “eligible” for FMLA leave even if the employee did not work at least “1250 hours in the past 12 months” if his/her employer failed to timely respond to the leave request. In doing so, the Court scaled back the pool of employees who can bring FMLA interference claims against employers.

In *Sinacole*, plaintiff was employed by iGate on a hourly, part-time, contractual basis. In November of 2000, she requested FMLA leave for the birth of her child and submitted the requisite FMLA paperwork. Her FMLA paperwork specified that her leave would commence on April 4, 2001. Although iGate did not respond to this request and never requested work from her after January 27, 2001, Sinacole took her leave on April 6, 2001. Thereafter, she submitted to iGate a “Notice of Intent to Return from Leave” in late May of 2001 indicating that she would return to work on July 2, 2001. However, in late June of that year, iGate sent Sinacole a letter terminating her employment. The termination was a part of a reduction in force due to the company’s financial difficulties.

Plaintiff sued iGate for terminating her employment prior to her return from FMLA leave. Sinacole argued that the company’s termination of her employment interfered with her FMLA right to return to her former position upon concluding leave in violation of 29 U.S.C.A. § 2614(a)(1). This provision states that employees who are legitimately on leave under the FMLA have the right to return to their former position upon concluding their leave. Although she did not dispute her lack of technical eligibility under the FMLA hours requirement, plaintiff pointed to DOL regulation 29 C.F.R. § 825.110(d), which states that after an employee makes a request for leave, “[i]f the employer fails to advise the employee whether the employee is eligible prior to the date requested leave is to commence, the employee will be deemed eligible. The employer may not, then, deny the leave.”

In upholding the dismissal of plaintiff’s FMLA interference claim on summary judgment, the Court held that 29 C.F.R. § 825.110(d) is invalid to the extent it expands the scope of employees who are covered by the FMLA by “giving otherwise non-eligible employees a cause of action for an employer’s failure to respond to an application for FMLA leave.” In doing so, the Court followed the Second, Seventh, and Eleventh Circuits which all had previously concluded that it is the “sole province of Congress” to establish the scope of employees who have rights under the FMLA.

Specifically, the Court ruled that the DOL cannot unilaterally modify the minimum number of hours an employee must work (at least 1250 hours) during the previous 12 months to be eligible for FMLA leave. Accordingly, since Sinacole did not meet this minimum threshold she was ineligible for leave under the FMLA. Thus, the Court concluded iGate did not violate the FMLA when it refused to restore plaintiff to her position.

Guidance for Employers

Upon receiving a request for FMLA leave, an employer should first determine whether the employee is eligible. In calculating the number of hours and months an employee has worked, eligibility must be calculated from the date the leave is to commence. Where an employee has requested FMLA leave prior to becoming eligible, generally, employers should determine when the employee is likely to become eligible and advise the employee of his/her eligibility status as soon as practicable. Although failure to timely respond to an FMLA request under these circumstances may no longer deem an otherwise ineligible employee “eligible,” responding as soon as practicable is still a prudent course of action. To assist in determining

eligibility, employers should maintain records of the amount of time each employee has worked.

In addition to these eligibility requirements, the employer must also provide the employee with written notice detailing the specific obligations and expectations of the employee and explaining any consequences of a failure to meet these obligations, and the notice must be written in a language in which the employee is literate. Furthermore, the employer must give notice to the employee of how the employee’s absence is to be designated, i.e., whether or not it is FMLA-qualifying. Where an employer is uncertain as to whether an employee is eligible for FMLA leave and/or if it needs assistance in responding to an FMLA request, it should consult with counsel for guidance. By taking these precautionary steps employers will avoid violating the FMLA and incurring expensive and time-consuming litigation.

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