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Recent Victories for Our Clients

Recently, PC&T obtained dismissal of a charge of age discrimination filed by an employee who had been laid off in a reduction in force after 27 years with the Company. Though the claimant contended she was “replaced” by an employee in her 20’s, that person held a degree and performed more sophisticated duties. Michigan law currently requires the protected employee to be “nearly identical in all relevant respects,” to show illegal disparate treatment. Moreover, because the laid off employee’s duties were dispersed among remaining workers, including the younger person, she was not truly “replaced” under the law.



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Future Trend?

The California Supreme Court this month issued a ruling that has broad implications for employers who permit sexual favoritism in the workplace. In *Miller v Department of Corrections*, the court recognized a claim for sexual harassment, even though the workplace romance was consensual and the complaining employee was never personally harassed or propositioned. The unanimous ruling broadened the definition of sexual harassment and involved *paramour* favoritism.

The case involved whether sexual favoritism in the workplace could constitute sexual harassment. The court addressed a situation where instances of preferential treatment became so widespread as to contaminate the working environment. The court held that “an employee may establish an actionable claim of sexual harassment under the [California Civil Rights Act] by demonstrating that widespread sexual favoritism was severe or pervasive enough to alter his or her working conditions and create a hostile working environment.”

The court reasoned that widespread instances of preferential treatment can create an atmosphere that is demeaning to women. By implication, the message becomes that female employees are “viewed by management as

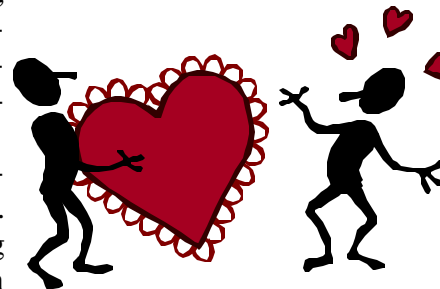
‘sexual playthings’ or that the way required for women to get ahead in the workplace is by engaging in sexual conduct with their supervisors.” The definition of “widespread” was fuzzy.

The plaintiff alleged that supervisor’s *paramours* received undeserved promotions, unwarranted employee benefits, publicly engaged in inappropriate behavior, and threaten reprisals if employees reported

the relationship to upper management. This conduct, the court found, stated a *prima facie* case of sexual harassment under a hostile work environment theory. Significantly, the complaining employees never were subject to sexual advances themselves.

For California employers, the decision requires they be vigilant to “office romances” that become “more than mere office gossip.” The court addressing privacy concerns, stated, “it is not the relationship, but its effect on the workplace, that is relevant . . .” Now, California employers need not only be concerned with whether or not workplace romances are consensual, but also with whether or not such romances have a discernible impact on the working environment of others.

Don’t be surprised to see an effort to develop this new theory in other states.



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- I-9 Forms
- Policy—Wage Deductions
- Relief of Charge
- Sample CCW Memo
- Sample Certification for Users of Consumer Report
- Severance Agreement and Release of Claims
- Severance Agreement and Release of Claims (In Compliance With Older Worker Benefit Protection Act)
- WH 380/381 Forms (under FMLA guidelines)
- Workplace Violence—Risk Factor Checklist


Terminating Employees on FMLA Leave

Many employers still believe that an employee requesting FMLA leave or on FMLA leave may not be terminated or laid off. While the FMLA prevents employers from terminating employees because they are on leave; layoff, discipline and termination decisions are legitimate as long as the reason is unrelated to the FMLA leave. FMLA leave does not stop termination for violating company rules, unsatisfactory performance or reduction in force.

The Department of Labor takes the position that when an employer takes “an adverse action” against an employee on FMLA leave, it bears the burden to demonstrate the employee would have been disciplined or terminated regardless of the request for or use of the FMLA leave. Meeting this burden requires careful attention. In that regard, compliance with record-keeping obligations, a published FMLA policy and history of providing other employee's FMLA without reprisal, is helpful. In most cases, proof that the employee was terminated for legitimate, non-retaliatory reasons, unrelated to the FMLA leave is essential.

Demonstrating terminations for misconduct or poor performance requires a showing that the employee's performance deserved termination. Frequently, the grounds for termination are not apparent to the employer until other employees fill in for the absent employee. Several courts have ruled that termination for the newly discovered performance problems is not discriminatory/retaliatory merely because the problems were discovered because the employee was absent on FMLA leave. If any other employee would have also been terminated for such performance problems, the adverse action is unrelated to the FMLA leave.

Likewise, when the business reason is related to a reduction in force or position elimination, assuming the employee would have been laid off had they been still working, the adverse action is unrelated to the FMLA. The proofs should not only demonstrate the business necessity of the layoffs, but also use an objectively descriptive guideline for determining who will be laid off and why.

Terminating an employee on FMLA leave is not unlawful, but will require proof demonstrating the decision was not related to the FMLA leave. Determining whether your employment decision has sufficient proof may benefit by an objective second opinion. PC&T can be helpful in providing that second look. 

Confusion over FMLA Releases?

The federal Fourth Circuit Court of Appeals recently ruled that employers must now obtain approval by the DOL or a court before a release of FMLA claims may be valid. *Taylor v Progress Energy* 415 F 3d 364 (CA 4, 2005).

Taylor contended that 29 CFR § 825.220(d) - which provides that “[e]mployees cannot waive, nor may employers induce employees to waive, their rights under [the] FMLA” - barred enforcement of her release insofar as her FMLA rights are concerned.

Taylor was laid off in a reduction in force. As a condition of receiving enhanced severance benefits, she signed a general release that was apparently meant to cover FMLA claims even though it did not specifically mention the FMLA. Notably, Taylor contacted the DOL about a potential FMLA claim before she learned of her lay off or signed the general release. Approximately two years after signing the general release, and without returning any of her enhanced severance benefits, Taylor sued Progress for various alleged FMLA violations.

The Fourth Circuit concluded that “[t]he regulation's plain language prohibits both the *retrospective* and *prospective* waiver or release of an employee's FMLA rights . . . [and] applies to all FMLA rights, both substantive and proscriptive.” Moreover, the Court found that this reading of § 825.220(d), was supported by its rulemaking history and the DOL's expressed intent to have “the FMLA's enforcement scheme . . . parallel the FLSA's [Fair Labor Standard Act],” was a “permissible construction” of the FMLA by the DOL.

The Sixth Circuit has upheld private releases of FMLA claims, albeit without any reference to § 825.220(d). *Halvorson v Boy Scouts of America*, 215 F 3d 1326 (CA 6, 2000).

In light of *Taylor*, employers in the Fourth Circuit -- *and perhaps elsewhere* -- should be aware that any private (non-DOL or court approved) release

of FMLA claims is vulnerable to challenge under § 825.220(d). As a backstop, employers are well advised to include in a release, an agreement and representation that the employee (i) has received all FMLA leave and other benefits to which he or she is entitled, (ii) has no pending request for FMLA leave, and (iii) does not claim that the employer has violated or denied any of his or her rights under the FMLA. Although not a release, these representations ought to provide at least a threshold line of defense to any post-release FMLA claims.

Until this conflict between the Circuits is resolved by legislation or the United States Supreme Court, employers seeking to settle potential claims under the FMLA should consider including the Department of Labor in that process or recognize the risk that a waiver not approved by the DOL or a court may not bar a subsequent FMLA (or FLSA) claim. ■



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