

PILCHAK COHEN & TICE, P.C.

Attorneys Representing Management in Labor and Employment Law



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“SUE THE BASTARDS” WHO SUE?

One of the most frequent questions asked by clients facing lawsuits is: Can we sue the Plaintiff for suing us? The unspoken question is actually: What protection does the legal system offer for those abused by the legal system? It is no secret that frivolous lawsuits are rampant. Many of the lawsuits our clients face is patently defective in at least one necessary element of the case. Knowing that, many plaintiff-side attorneys quickly offer to settle for the amount of legal fees that the employer will be required to expend. If you are thinking that sounds like blackmail, the correct legal term is “extortion.”

Ironically, for a society that so strongly endorses litigation as the answer for most ills, the door is closed, and almost locked for those wronged by merit-less lawsuits. The evil lies in the “American System,” which dictates that each side bears its legal fees. (Except for discrimination, wage/hour, and whistleblower statutes that grant successful plaintiffs their legal fees.) The opposite of the American System is the English System, where the unsuccessful litigant pays his opponent’s legal fees. This alone explains why the U.S. has 28.45 attorneys per 10,000 people, while in Britain the figure is 16.99 (counting both “barristers”- trial lawyers- and “solicitors,” who cannot appear in court). Who wouldn’t play the casino if you could gamble with somebody else’s money?

Yet, surprisingly, PCT has succeeded in recouping defense costs. (\$36,000 and \$60,000 against companies that asserted non-competes against two clients’ employee; \$14,000 against a litigant who filed a frivolous discrimination case; \$28,000 and \$17,000 for trial fees against separate individuals in age discrimination cases.) But recovering attorney fees is a daunting task. Here are the weapons that can be used, and the impediments faced:

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Recent Victories for Our Clients

PCT has successfully obtained summary dismissal in another whistleblower case. The case involved a leasing agent terminated after threatening to report licensing violations to the county. Although no violation was actually reported, it was contended the employee was terminated because she was “about to report” the violations. The Circuit Court ruled that although evidence of a protected activity was demonstrated, evidence of pretext and causation were absent. That is, the leasing agent’s poor job performance was not sufficiently challenged, nor shown to be discriminatory. This case was particularly challenging because of the highly regarded reputation and abilities of plaintiff’s counsel.

PCT has successfully obtained summary dismissal of an employment case. The former employee claimed: age discrimination, intentional emotional distress; discharge in violation of public policy and breach of employment contract. Based on her deposition testimony, PCT argued insufficient evidence existed to permit trial. Cross-examination produced admissions adequate to convince the Court that trial was unnecessary. Summary dismissal motions, based on a strong cross-examination record of the former employee, continues to be the most successful litigation strategy used by PCT in defending employment lawsuits. ❖

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- HIPAA Authorization for Disclosure / Use of Personal Health Information
- I-9 Forms
- Policy—Wage Deductions—**NEW**
- 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

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“SUE THE BASTARDS” Who Sue?

LITIGATION SANCTIONS: Both the state and federal court rules provide that one can be assessed sanctions for asserting claims (or defenses) that lack arguable factual or legal merit. The problem is that sanctions are entirely in the discretion of the trial judge. Judges, especially if they were once plaintiff-side attorneys, are reluctant to saddle plaintiffs with the cost of litigation. If sanctions were granted in every case that warrants them, it would change the legal system. In fact, when federal Rule 11 was first passed, so many sanctions motions were filed, that the rule was soon emasculated. Now, the wronged party must serve the sanction motion, and give the opponent an opportunity to withdraw or amend the claim. However, most lawyers know that giving advance warning of the defenses can cause an unscrupulous opponent to tailor their testimony to overcome the defect. Thus, sometimes Rule 11 motions can actually hurt the defense.



MALICIOUS PROSECUTION/ABUSE OF PROCESS- These common-law causes of action have been “on the books” for more than a century. However, the courts have required wrongfully-sued parties to show that they have suffered “special damages,” which is a nearly impossible task. Neither economic ruing nor mental distress suffice as “special damages.” In fact, no Michigan decision has ever actually found special damages. The decisions universally say what does not suffice. Other states allow these suits to proceed only where one has been wrongfully enjoined or arrested, or one’s property attached.



LIBEL AND SLANDER- Nothing contained in a Complaint filed with the court or stated at a deposition can constitute libel or slander, because they are subject to a “litigation privilege.” Moreover, a nasty trend has been developing in some courts, where assertion of a counter-claim is considered “retaliation per se” against a discrimination or civil rights plaintiff.



SETTLEMENT AGREEMENTS/COVENANTS NOT TO SUE- In a surprising number of cases, the Plaintiff sues after having executed a settlement agreement where they waived their right to sue. Sometimes, the agreement contains a promise that they would not sue. Amazingly, under the “American Rule,” the agreement can be asserted to block the suit, but unless it specifically provides for payment of attorney fees, they cannot be collected as damages.



CASE EVALUATION SANCTIONS- This is the one area where employers have the advantage. Every case must eventually go through the Case Evaluation process, where a panel of three attorneys places a settlement value on the case. If a party rejects that evaluation, and does not collect at least 10% more of the evaluation amount at trial, they must pay the other side’s costs and fees after the date of the rejection. The employer has an advantage, because under most statutory claims, it must pay attorney fees if it loses, anyway. So, generally, only the plaintiff faces additional risk for rejecting evaluations.



This state of affairs is one of the many reasons why PCT so strongly encourages its clients to plan discharges in advance, so that even frivolous cases are not filed. ❖

Has a Court Finally Found a Duty to Cooperate Under the FMLA?



We at PCT are constantly on the lookout for new cases and theories to reduce the administrative burdens placed on our clients by legislation like the ADA and the FMLA. Last month, one such case was decided by the United States District Court for the Southern District of New York. The case is Geromanos v. Columbia University, College of Physicians and Surgeons, 322 F. Supp. 2d 420(SD NY 2004), and the question it raises is whether a duty to cooperate will be read into the FMLA by the courts. Certainly if such a duty is imposed on employees asserting FMLA rights, employers will have an increased ability to cut down on the potential for abuse.

In the Geromanos case, the plaintiff was an alcohol-dependent research nurse whose performance started to deteriorate after two years of excellent service. Ultimately, she was admitted to a hospital for alcohol intoxication when she was observed at work in a semi-unconscious state. She was later placed on leave so she could undergo substance abuse treatment and rehabilitation. Because the employer's policy permitted discharge for reporting to work while intoxicated, the employer placed certain conditions on the plaintiff in lieu of discharge. One of the conditions was that she submit weekly progress reports of her progress. While the plaintiff was in rehab, her doctors regularly communicated with the employer concerning the plaintiff's progress and lack thereof. Although the employer considered her leave to be an FMLA leave, the plaintiff was never advised of this.

Six weeks after her 12 week FMLA allotment expired and while the plaintiff was still on leave, the employer learned that she had suffered two relapses and had been working part time as a Lamaze instructor. Based on this information, the employer fired her. Geromanos brought suit alleging interference with her rights under the FMLA. Specifically, she argued that her employer interfered with her rights by 1) failing to inform her of her FMLA rights; 2) failing to inform her she was being placed on FMLA leave; 3) requiring her to submit weekly progress reports while on leave; and 4) terminating her for failing to provide the reports and for working a second job.

The Court dismissed the plaintiff's claims, noting that Geromanos received her entire FMLA entitlement (twelve weeks), in addition to benefits beyond those required by FMLA (including salary continuation for part of her leave). And, there was no evidence that she was discharged for taking FMLA leave. According to the Court, Geromanos had no right to reinstatement because she was incapable of performing the essential functions of her position at the end of the twelve weeks. The Court determined that an employer's failure to notify an employee of FMLA procedures does not, in and of itself, constitute interference with the exercise of FMLA rights if the lack of notice did not cause the plaintiff to forfeit FMLA leave.

The Court also rejected the claim that requiring weekly progress reports of her treatment violated the FMLA provision, which only permits re-certification once every 30 days. According to the Court, there is a difference between asking an employee to certify on a weekly basis that she continued to be an alcoholic as a condition to allowing her to remain on FMLA leave and seeking proof that the employee was cooperating with the terms of her paid leave of absence. The Court went on to say that since Congress did not require FMLA leave to be paid leave, the employer was free to impose whatever conditions it chose as a condition of continuing the plaintiff's salary while she was not working - including the provision of reports detailing her cooperation with and progress in the substance abuse program she was attending.

While this is not the first time a court has used a "no harm no foul" approach where an employer commits a technical violation of the FMLA (*See e.g. Ragsdale v. Wolverine Worldwide*, 122 S Ct 1155 (2002)), the case does appear to be one of first impression on an employer's right to seek weekly updates of an employee's treatment progress despite the FMLA regulation which limits re-certification to once every 30 days absent extenuating circumstances. Although the Court explained that the employer could insist on such weekly updates because it was providing salary continuation, which was not required under the FMLA, the Court did note that:

"Columbia did not ask plaintiff to certify on a weekly basis that she continued to be an alcoholic as a condition to allowing her to remain on FMLA leave. Indeed, there is no evidence that Columbia ever intimated that plaintiff was not entitled to be on FMLA leave, which is the concern that limiting recertification is intended to address."

This language raises the question whether the Court would have permitted weekly updates if the employer had not continued the plaintiff's salary. Certainly, the above language can be interpreted to mean this.

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News Cases

Given this rationale, it would appear that the Court might also permit direct communications with the rehabilitation doctors where the communications pertained to the employee's cooperation with the treatment regimen rather than about the threshold question of whether the employee suffered from a serious health condition.

Whether this case will spark the beginning of a court-made duty of cooperation under the FMLA (like the ADA) is yet to remain. However, the language used by the Court certainly opens up the door for the argument that the restrictions placed on employers by the FMLA (e.g. updates no more frequently than once every 30 days and no direct communications with the employee's health care provider) may only have application where the update and/or direct communication is sought to determine whether the employee has a serious health condition. We will have to wait and see how other courts react to this decision and whether any court will go as far as to penalize an employee who fails to cooperate with his/her employer in the context of an FMLA leave. ❖



MARK YOUR CALENDAR

October 21, 2004—Lorman Education Services—**Employment Law from A-Z***—
Marriott Hotel in Troy, MI from 8:30 am to 4:30 pm

* First time offered in Michigan

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