FMLA Faux Pas

Special Edition

Sometimes a case comes along that we feel is important to share with our newsletter readers. *Lubke vs. City of Arlington* is just such a case. Two factors drew our attention to *Lubke*. First, it involves the Family Medical Leave Act, and although the FMLA has been around for over a decade, there seems to be a renewed interest in it. Clients are asking a lot of FMLA questions, and we are seeing more FMLA cases in the legal reporters. Secondly, it was a case that made us say "OUCH." What was probably an unwitting violation of the FMLA cost the employer a lot of money. So let's look at the facts and outcome of this case and see what we can learn from it.

The decision in *Lubke* was handed down by the Fifth Circuit Court of Appeals on June 30, 2006. The players in the case were the defendant/employer, the City of Arlington, Texas and the plaintiff/employee, Kim Lubke, a Battalion Chief in the city's Fire Department. The story began in late 1999 when the world was preparing for Y2K and the unknown chaos it might bring. The Fire Department and other critical city departments had developed contingency plans in the event of widespread electronic problems. As a part of these plans, the Fire Department put more rigid controls on employee absences including restrictions on how employees call in to report their absences. Also, although the City normally had an informal sick leave policy, during the Y2K period, employees were required to provide a doctor's written substantiation of any absence.

Lubke was scheduled to work during the Y2K weekend; however, on the evening of Dec. 30th, he called and left a message stating that he would not be reporting for duty because he needed to stay home to care for his sick wife who had experienced flu-like symptoms and back pain throughout the month. Lubke claimed that his wife's back pain had been a chronic condition and that she was incapacitated from 12/30 to 1/3. When the Lubkes returned to work on 1/3 (she also worked for the City), they submitted a doctor's note dated 12/22 and receipts for 3 prescriptions. Lubke's leave was disapproved for insufficient substantiation; his wife's leave was approved. Lubke claimed that he repeatedly asked the Assistant Fire Chief what type of substantiation would be sufficient but received no answer. He asked Human Resources for clarification on the requirements but was referred back to the Assistant Chief who refused to answer. After a grievance process, Lubke was fired in April 2000 for dereliction of duty, unauthorized absence and insubordination. Up until this time, he had never received a clear answer on what type of medical documentation the City required. After his discharge, Lubke produced letters from two doctors who had treated his wife addressing her condition and explaining why Lubke was needed to care for her. Lubke appealed his discharge, but the Fire Chief stated that the letters were untimely. Lubke then sued the City for violation of the FMLA. After a 10-day jury trial, the jury handed down a verdict for Lubke and awarded him over $1,000,000 in damages. The Fifth Circuit upheld the verdict as to the liability of the City but reversed and remanded the damage award. The remand on damages, however, affects only a portion of the damages and even if that part is lowered, Lubke will still receive a large sum in addition to a substantial award of attorney's fees.

An trial, the City first argued that Lubke's wife did not have a serious health condition, and therefore, his leave was not FMLA-protected. The 5th Circuit held that there was enough evidence for the jury to find that the wife had a chronic condition justifying the FMLA leave. The jury's decision that there was a serious health condition shows how an employer's decision on these issues can be second-guessed. Looking at the facts of the case and the wife's illness, it was a close call. <u>While employers can't roll over and play dead, they would be wise to proceed with caution when meting out severe discipline in cases where the illness *might* be FMLA-protected.</u>

The City also argued that Lubke's leave was not protected by the FMLA because he failed to provide proper medical documentation. In affirming the jury's rejection of this position, the 5th Circuit reasoned that the FMLA regulations provide that "if an employer fails to provide notice [about FMLA requirements] . . . the employer may not take action against an employee for failure to comply with any provision required to be set forth in the [employer's] notice." In other words, the City's failure to provide Lubke with notice of exactly what certification would suffice prevented it from taking action against him for failure to timely provide proper documentation.

Fenley & Bate, L.L.P.

ATTORNEYS AT LAW

224 E. Lufkin Avenue ▪ P.O. Box 450 ▪ Lufkin, Texas 75902-0450
TELEPHONE (936) 634-3346
TELEFAX (936) 639-5874

415 N. Washington, Ste B, Livingston, Texas 77351
TELEPHONE (936) 327-1100
TELEFAX (936) 327-1107

EMAIL OFFICE@FENLEY-BATE.COM

The FMLA places burdens for documentation and notices on both employer and employee. The statute provides that "an employer may require that a request for leave . . . be supported by a certification issued by the health care provider of the eligible employee or . . . spouse . . . [and] [t]he employee shall provide, in a timely manner, a copy of such certification to the employer." The regulations specify how and when employers may require certification. An employer's request (i) must be in writing, (ii) must be made (in most cases) within 2 business days after the leave commences, or at some later date if the employer subsequently has reason to question the appropriateness of the leave; (iii) must advise the employee of the specific expectations and obligations of the employee and explain consequences of failure to meet the obligations; (iv) must allow the employee at least 15 days to respond to the medical certification request and (v) must provide the employee with a reasonable opportunity to cure any deficiency if the original certification is insufficient or incomplete. It is not clear from the facts recited in the published opinion of the case whether the City gave Lubke the FMLA-required notices, but it is apparent that any notices given did not explain the requirements for the doctor's certification. Typically, an employer fails to give an employee the required FMLA notices for one of several reasons. First, the employer may have analyzed the situation and decided that the leave was not FMLA-protected. In *Lubke,* the jury's large damage award shows the effect of being second-guessed on this type of decision. Alternatively, an employer may not even think about the FMLA in analyzing an absence-related discipline decision. In *Lubke,* it is obvious from the facts that the department was angry with the employee for being absent at a critical time. Focusing on this aspect of the situation could have diverted their attention from the FMLA-protected nature of the absence. In analyzing employment actions based on an employee's absence, employers must make an objective, big-picture analysis of the situation before coming to a decision. A final explanation for the lack of FMLA-required notice by an employer is a failure of their FMLA system. Some employers do not have a formal FMLA process that triggers the human resources representative to send out the required notices to an employee on leave. This can be costly in the event the employer later wants to terminate the employee for his absence or lack of medical documentation. Employers who are covered by the FMLA should develop a formal system with assigned individuals to send out the required notices when employees take medical leave. Do not rely on informal notice to an employee and expect to be able to take action against him later.

At trial, the City conceded that had Lubke submitted the doctors' letters earlier in its investigatory process, it would have approved his FMLA leave. We suspect that the actual facts of the case are a little less clear that the short recitation in the 5th Circuit's opinion. They always are in real life. And, because as employers, we are required to make decisions and manage employees "in real life," we would do well to heed the lessons of this case – implement a formal and effective FMLA notice and documentation system; when making employment decisions, proceed slowly and cautiously; and don't react based on emotion but act based on reason, considering the situation objectively after taking into account all factual and legal aspects.

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224 E. Lufkin Avenue ▪ P.O. Box 450 ▪ Lufkin, Texas 75902-0450
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415 N. Washington, Ste B, Livingston, Texas 77351
TELEPHONE (936) 327-1100
TELEFAX (936) 327-1107
EMAIL OFFICE@FENLEY-BATE.COM