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Fraudulent Leave, Surveillance-Based Terminations

Law360, New York (January 26, 2009) -- One of the greatest difficulties employers face in administering medical leave policies is managing suspected fraudulent use of leave time. Reports and rumors that an employee taking time off work with job protection and continued benefits (and sometimes with pay as well) is using the time for personal activities can badly damage co-worker morale in addition to the direct cost to the employer.

Employers are increasingly tempted to conduct surveillance in an effort to catch suspected slackers. The question then becomes: how solid must the evidence of abuse of leave be to justify discharge?

Some courts have adopted a subjective "honest belief" standard; others go further in requiring an objectively reasonable basis for such a belief.

The Seventh Circuit Court of Appeals has been perhaps the strongest proponent of a pure "honest belief" analysis.

For example, in *Vail v. Raybestos Products Co.*, Plaintiff Vail suffered severe migraines. She requested and received authorization to take intermittent FMLA leave, and her supervisors regularly approved her time off work for this purpose.

She typically called in before the start of her night shift to say she wouldn't be at work. Her supervisors, knowing that Vail worked part-time at her husband's lawn mowing business, became suspicious when the frequency of her leave requests increased during the summer months.

The company hired an off-duty police officer to monitor Vail's activities. After the surveillance was initiated, Vail's doctor told her she should not work for the next 24 hours after taking a new blood pressure medication, and Vail called in to say she would not be at work that night.

The next morning, the surveillance officer observed her mowing the lawn at a cemetery serviced by her husband's business. Vail then called in and requested FMLA leave for her shift that night because of the onset of a migraine. The company terminated her employment and she sued, claiming job protection under the FMLA.

The Seventh Circuit held that the employer did not violate Vail's FMLA rights because it had an honest suspicion that she was abusing her leave.

Despite a doctor's note attempting to explain Vail's condition, which the company received the same day she was observed mowing, the court found that the employer honestly believed Vail was "gaming" her FMLA leave because her observed activity reinforced its suspicion that she was not using her leave for its intended purpose.

Although the court noted that surveillance by an off-duty police officer "may not be preferred employer behavior," it upheld the termination for abuse of leave.

At least one circuit, the Sixth, has applied a slightly different "honest belief plus" standard in evaluating employer action against employees believed to have been dishonest regarding medical conditions.

In *Smith v. Chrysler Corp.* the plaintiff answered "no" to the question "Have you ever had narcolepsy?" on a plant driver's license application form. He later sought the accommodation of a regular day work shift for a medical condition similar to a sleeping disorder he previously experienced, which a company doctor identified as narcolepsy. The company terminated him for dishonesty.

In evaluating whether the employer's honest belief that the plaintiff had lied on an application was dispositive of his ADA discrimination claim, or whether the plaintiff could prevail by showing that his response was not deceptive based on his own understanding of his condition at the time he completed the application, the court rejected the Seventh Circuit's "honest belief" approach to the extent that it would credit an employer's belief without requiring that the belief be based on "particularized facts rather than on ignorance and mythology."

A recent case out of the Eastern District of Wisconsin shows how challenging this "honest-belief plus" standard may be for employers.

In *Nelson v. Oshkosh Truck Corp.*, the plaintiff-employee took medical leave due to

migraines. The employer became suspicious because she brought her leave request in personally and appeared to be "dressed properly" to be "going somewhere."

Two days of surveillance produced evidence of the plaintiff driving around for several hours each day shopping and running other errands that involved moderate physical activity. The certification she provided indicated that she could not reliably perform her job duties due to mental illness and a need to work through the side effects of her medication.

The court was satisfied that the employer's suspicions were understandable, but denied the employer's motion for summary judgment based on a clarifying report from the plaintiff's doctor that she was not able to work during the time she was on leave but was able to attend to personal business.

Comparing the facts presented to those in the *Vail v. Raybestos* case, the court concluded that "Driving around town on personal errands for a few hours is significantly different than mowing lawns for a family business."

In light of the varying standards being applied, employers would be well-advised to compile a very solid evidentiary basis that an employee seeking medical leave or accommodation has engaged in fraud before discharging that employee.

With a careful and thorough approach, surveillance may be appropriate and effective. Following are some best practices for employers considering surveillance of employees who are requesting leave or accommodations based on medical conditions:

- Have a Good Reason for the Surveillance. Even the *Vail* court emphasized that employee surveillance is not a "preferred practice." Employers should consider surveillance only when there is very solid reason to suspect abuse of leave or accommodations. Anonymous reports may provide sufficient reason depending on the circumstances, but resist relying solely on the rumor mill.
- Be Consistent. An employee in a protected class who has been subjected to surveillance may argue that he or she was discriminated against if someone else outside that protected class who was reportedly abusing leave or demanding unneeded accommodations was not similarly monitored.

Likewise, if surveillance is used only for suspected abuse of FMLA leave but not other types of leave, the practice is subject to challenge. Any employer ordering selective surveillance

should be fully prepared to explain the decisions made. The explanation should be something more than a feeling that the employee who was not subject to surveillance "just isn't the type of person" who would abuse leave.

- Select the Right Investigator. Employers must resist the temptation to hire a co-worker's out-of-work cousin who has no experience in investigation but who is immediately available and willing to work cheap.

Employers should use only experienced, trained investigators to get reliable information and avoid liability for illegal activity such as invasion of privacy and trespass. Trained investigators can be expensive, but the cost of defending against claims arising from a bungled investigative effort can make those fees seem small by comparison.

- Keep an Open Mind. Employers should be prepared to accept the findings, whatever they indicate. If an investigation does not disclose any activity inconsistent with the leave or requested accommodation, but the employer takes punitive action against the employee anyway based on a firm conviction that the employee is "gaming" the system, the surveillance may be more harmful than helpful to the employer's case.

- Put Any "Honest Belief" To the Test. Before taking punitive action based on an investigative report indicating abuse of medical leave, an employer should be prepared to fully back up its "honest belief" that the employee has abused the leave benefit. One hundred percent certainty is not required, but the suspicion must be at least strong and honestly held, and in some jurisdictions supported by particularized objective facts, in order to pass muster if challenged.

- Don't Ignore Efforts To Explain Apparent Inconsistencies. If the employee who apparently engaged in fraud offers an explanation or clarifying documentation, the employer should take it into consideration, ask follow-up questions as needed or request additional information, and make a thoughtful determination about whether it changes the planned course of action. The answer may be that it does not, but the employer will be prepared to address the issue with a reasonable explanation if the dispute ends up in litigation.

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