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Employees Must Be Given Clear, Actual Notice of FMLA Policies

By Eric Stevens and Alex Frondorf

Ambiguity and confusion can be costly. In *Thom v. American Standard, Inc.*, the Sixth Circuit Court of Appeals awarded liquidated damages in a case “arising from confusion as to when an employee should return to work after his leave.”¹

The plaintiff, an employee who had worked for American Standard for 36 years, went on medical leave under the federal Family and Medical Leave Act (FMLA) to undergo surgery for a non-work related injury. The company granted his leave request and informed him, in writing, that his leave would extend until June 27. Following his surgery, the plaintiff began recovering faster than expected by his doctor. His doctor provided him with a note releasing him to light duty beginning May 31 and to full duty on June 13. As a result, the plaintiff attempted to return to work on May 31, which was before the expiration of his approved FMLA leave. He was not allowed to return to work at that time because the company did not permit employees with non-work related injuries to perform light duty work temporarily after FMLA leave.

On June 14, the company contacted the plaintiff to ask why he had not returned to work the previous day. The plaintiff explained that he was suffering from increased pain and would return to work on June 27, as originally scheduled. The plaintiff received a doctor’s note explaining his condition and delivered it to the company on June 18. When he delivered the doctor’s note, he was informed that each day between June 13 and June 17 was as an unexcused absence and, consequently, his employment was terminated.

The FMLA makes it unlawful for an employer “to interfere with, restrain, or deny the exercise of or the attempt to exercise, any right provided” by the FMLA.² The plaintiff’s complaint alleged that the company interfered with his FMLA rights by terminating his employment. The company argued that, based upon the method by which it calculated FMLA leave eligibility, the plaintiff actually exhausted his FMLA leave eligibility on June 13.

The FMLA allows an employer to select one of four methods for calculating leave. One such method is the “rolling” method, which calculates an employee’s leave year “backward from the date an employee uses any FMLA leave.” The “calendar” method is another way to calculate leave, and provides for 12 work weeks of leave per calendar year. In this case, under the calendar method, the plaintiff’s FMLA entitlement would have run through June 27, as the company originally instructed him. However, the company’s position was that it used a “rolling” method

and, therefore, the plaintiff's FMLA leave was exhausted before his employment was terminated. The district court granted summary judgment for the plaintiff on his FMLA interference claim and awarded him \$99,960 in attorney's fees, \$2,732 in costs, and \$104,354 in back pay.

The company appealed the district court's decision, contending it had the right to decide which method of FMLA calculation would apply to its employees and that notice of the method should be imputed to the plaintiff because the union that represented him was aware of the calculation method. The appellate court found no merit in this argument and, agreeing with the district court that the company never actually informed the plaintiff of this policy, held that "employers should inform their employees in writing of which method they will use to calculate the FMLA leave year."³ The court went on to say that clear written notice ". . . is consistent with the principles of fairness and general clarity."⁴ It was not helpful that in this case the company originally informed the plaintiff that his leave would expire on June 27 (under the calendar method) and did not notify the plaintiff of the change in the calculation method to the rolling method until it was defending the lawsuit.

Yet, the appellate court did more than just affirm the district court's ruling – it also granted the plaintiff liquidated damages, finding that the company did not establish that it acted both reasonably and in good faith – two elements that must both be proven to avoid liquidated damages. The court noted that there is "a strong presumption in favor of awarding liquidated damages that are double the amount of any compensatory damages."⁵

Although the decision does not make new law, it serves as a good reminder to employers of several important lessons. Employers must clearly communicate, in writing, the method used to calculate FMLA leave. An employer may change the method of calculation, but it must promptly and clearly notify its employees of such a change and that change should not result in employees being deprived of accrued FMLA eligibility. Additionally, employers must make sure *they* accurately calculate an employee's FMLA eligibility before advising the employee. Finally, as a practical matter, it is advisable to consider business judgment principles when long-term, otherwise satisfactory employees, suddenly face termination based on what judges or juries might likely perceive as a mere "technicality."

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¹ *Thom v. American Standard, Inc.*, Case No. 09-3507, 2012 U.S. App. LEXIS 1166, at *1 (6th Cir. Jan. 20, 2012).

² 29 U.S.C. § 2615(a)(1).

³ *Thom*, 2012 U.S. App. LEXIS 1166, at *9.

⁴ *Id.*

⁵ *Id.* at *17.