

LEGISLATIVE UPDATE

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The Requirement To Properly Restore An Employee Following FMLA/NJFLA Leave

An opinion from a federal New Jersey court in Theodossiou v. Commerce Bank, N.A., 2009 U.S. Dist. LEXIS 65926 (D.N.J. July 31, 2009) highlights just how difficult it can be to navigate the disability management waters in litigation. The central legal issue was whether the plaintiff established a triable issue regarding whether she was reinstated to her previous position following an approved leave under the federal Family and Medical Leave Act (“FMLA”) and the New Jersey Family Leave Act (“FLA”).

The reported facts of the case are as follows. The plaintiff worked for the defendant as an Assistant VP and Operations Manager. In early 2005, she became pregnant. In November 2005, she took an approved leave of absence. During her leave, she became eligible for FMLA and FLA leave. During her leave, the company decided to reorganize its Residential Mortgage Department. As of April 2006, it was likely that the position of “Operations Manager” would be eliminated as part of the restructuring. However, the plan was not implemented or made public to the company’s employees until June 6, 2006. The plaintiff returned to work on May 2, 2006. When she returned, she asked her manager what she should be doing, and contends she was sent to a different department to update records. When she asked if she could return to her old job, she was allegedly told to “hang on, do something, and [we will] let you know.” After the restructuring was announced on June 6, 2006, the plaintiff was informed that her position was being eliminated and she would have 60 days to try to secure another position. She was unable to do so, and was terminated on August 7, 2006.

Among other claims, the plaintiff alleged that her entitlement to FMLA leave was denied because she was not restored to her original job or an equivalent position upon her return from leave. The FMLA regulations define an “equivalent position” as “one that is virtually identical to the employee’s former position in terms of pay, benefits and working conditions, including privileges, prerequisites and status. It must involve the same or substantially similar duties and responsibilities, which must entail substantially equivalent skill, effort, responsibility, and authority.” 29 C.F.R. §825.215. In moving for summary judgment, the Company argued that upon her return from leave, the work she did was consistent with and appropriate for her position, that she continued to receive the same salary, and that any changes to her position were merely *de minimus*. In response, the plaintiff argued that she was not in a managerial position when she returned from leave and that she ended up doing clerical work until she was ultimately terminated. The Court denied the company’s summary judgment motion, holding that “there is clearly a question as to whether or not [the plaintiff] was restored to the Operations Manager position or a position that had ‘substantially similar duties[.]’”. The court further held that making such a determination “is generally a question of fact for the jury” and that resolving the question required an understanding not only of the job descriptions, but also of the actual work performed and authority possessed by the plaintiff before and after her leave. Barring an appeal or settlement, the issue will be presented to a jury.

As a practical matter, the potential damages stemming from the entitlement claim appear to be limited. There was no dispute that the plaintiff would have lost her job in August 2006. The plaintiff did not lose any salary between her return in May 2006 and her termination three months later. The only dispute appears to be whether the plaintiff was performing the same job both before her leave and after her leave. However, the FMLA contains liquidated damages and attorneys’ fees provisions, which in some instances, tend to drive a case. The case highlights how carefully a company must tread when dealing with employees on FMLA (and other) leave, and how a company must plan to deal with returning employees on FMLA leave, even when the company itself is going through significant changes.