IADC COMMITTEE NEWSLETTER

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FMLA right to return to work is triggered by a doctor's note of return to work with no restrictions. The Third Circuit in Bunhun v. Reading Hospital and Medical Center issued February 10, 2014 an opinion of first impression that places employers on notice of the timing of the exercise of this right.

When an Employee Returns From FMLA Leave

ABOUT THE AUTHOR

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INTRODUCTION

The Family and Medical Leave Act ("FMLA") was passed in 1993. It is applicable to employers with 50 or more employees. The substantive terms of the Act allow an employee who has worked at least 1,020 hours to take unpaid, requested leave for no more than twelve (12) weeks in a rolling year. Employers are entitled to require certification by a physician as to the necessity for the leave – that a serious medical condition exists –[1] likewise the employer is able to require a certification by the physician that the employee is fully able to return to work.[2] Following the period of leave an employee has the right to be restored to his or her original position or its equivalent §2614(a)(i)(c).[3]

This right is not unqualified. *See Sista v. CDC IXIS North American, Inc.*, 445 F.3d 161, 174 (2d Cir. 2006): "If the employee is unable to perform an essential function of the position because of a physical or mental condition, involving the continuation of a serious health condition, the employee has no right of restoration to another position under the FMLA." There is often some tension between the employer's perception that an employee is able to return to work and a physicians' certification of the same. Other issues for the employer occur when the employee does not return after 12 weeks following expiration of the FMLA leave, or attempts to return seeking accommodations under the Americans with Disabilities Act ("ADA"). This article explores issues arising from an employee's return to work after taking FMLA.

In *Budhun v. Reading Hospital and Medical Center,* No.11-4625 (3d Cir. 2014) a credentialing assistant came to work with a metal splint on her wrist due to a non-job related injury to her wrist and pinky. *Id.* at p. 3. The employer's FMLA policies provided:

- An employee entitled to FMLA is allowed 12 weeks of unpaid leave during any rolling 12 month period;
- an employee requesting FMLA leave must submit a certification form from a healthcare professional prior to obtaining approval;
- before returning to work, an employee must submit a "fitness-for-duty" certification by way of a form "that confirms that the employee can 'work without restriction' before returning." *Id.* at pp. 3-4 citing Record Appendix 159.
- employee's failure to contact employer's human resources department at the end of the FMLA leave imputes a voluntary resignation by employee. *Id*. at p. 4.

[1] An employer is entitled to an initial certification from the employee's physician to provide basic information "regarding the employee's condition, the duration of any disability and its effect on employment. *Miedema v. Facility Concession Services, Inc.*, No.11-20580 (5th Cir. 2012).

[2] 29 U.S.C. §2612(a)(i)(d).

[3] When an employee cannot perform an essential function of the original position due to a "continuation of a serious health condition," no right to job restoration exists. 29 C.F.R. §825.216(c)

The job description for the position performed by Budhun was to create and maintain records and display "efficiency and accuracy in the credentialing" of healthcare providers, including "preparing and mailing credentialing packets, processing and verifying credentialing information, performing data entry, scanning and similar tasks." *Id.* at 3, citing Record Appendix 140.

Budhun's appearance at work with a metal splint on her finger was followed with an HR representative sending her an email on August 2, 2010 advising: "Your supervisor has made us aware that you have an injury that prevents you from working full duty," and attaching FMLA leave forms *Id*. at p. 4. Budhun left work and saw a doctor on August 3, 2010.

By email to HR on August 12th Budhun advised that she could type, but not fast and write a little and would return to work on August 16th. She returned with all necessary FMLA forms. This included a note from the doctor stating, "No restrictions in splint." *Id.* at 4. When Budhun emailed that she could type, but not fast and write a little, Readings' HR representative was not satisfied. By responsive email, she told Budhun that return with "no restrictions" meant she "should be at full duty (full speed) in your tasks. If you are unable to do so, you should contact your physician and ask him to write you an [sic] excuse to stay out of work until you may do so." *Id.* at p. 4, citing Record Appendix 431.

With this direction Budhun left work and the doctor provided additional certification of a return to work date in September and ordered occupational therapy. The treatment rocked along with the doctor using the "fitness for duty" definition provided by the representative. The time off ultimately exceeded FMLA leave and the personal leave as directed by the doctor. At the expiration of her FMLA leave, Budhun's positon was replaced by a worker who had worked part time in the department with typing skills of the "hunt and peck" variety. *Id.* at pp. 6, 14. Ultimately, Budhun did not return to work at Reading.

The Third Circuit vacated the district court's entry of summary judgment on Budhun's claims of FMLA interference and retaliation in a case of first impression[4] as to "what constitutes invocation of one's right to return to work . . . . *Id.* at p. 10.

Employee's Right To Return To Work

The Court's holding followed that of the Sixth Circuit in *Brumbalough v. Camelot Care Ctrs.*, 427 F.3d 996, 1003-04 (6th Cir. 2005). The *Brumbalough* case involved interpretation of a similar version of the same regulation and held a mere statement that the employee could return to work was sufficient. *Id.* at 1003-04. Specifically, the rule adopted by both courts is that "once an employee submits a statement from her health care provider which indicates that she may return to work, the employer's duty to reinstate her

[4] First impression in the Third Circuit.

has been triggered under the FMLA." *Id.* at p.1004.

Employers may feel trapped by a returning employee who it perceives cannot perform the job the way it was designed and was performed in the past. The regulations provide help, but planning is key - for example, creating a process for a doctor's certification of a serious health condition that includes the essential functions of the job on the front end. The *Budhun* court noted the regulations allow for an employer to require a certification from the doctor addressing the employee's ability to perform the essential function of her job, "but only if the employer provides a list of essential functions to the employee at the time that the employer notices the employee that she is eligible for FMLA leave." *Budhun,* No.11-4265 at p.10, citing 29 C.F.R. §825.312(b).

An employer cannot redefine what essential functions of the job are at the time an employee seeks to return to work from leave and avoid liability under the FMLA. In the *Budhun* case, the job description did not mention typing speed as a basic or essential function. The Court found Reading's HR representative in effect overruled the doctor's assessment. An employer runs the risk of an action for retaliation for failing to heed the doctor's directions. *See, e.g., Strickland v. Water Works and Sewer Board of the City of Birmingham,* 239 F.3d 1199, 1206 (11th Cir. 2001). Employers increasingly find doctors' authority over the workplace growing with FMLA use. Recently, one employer checked with a doctor about the basis of the certification and the staff person's response was not consistent with extending the FMLA. When she noted the employer's hesitation, she blurted out, "well, what do you need to know? We want her to have the time off."

Employers have options. The regulations allow an employer to obtain clarification from an employee's doctor regarding her fitness-for-duty certification. The employer may call the doctor (with the employee's permission) and asked about restrictions. As a caution; any employer representative who makes such a call should be advised that introducing essential job functions, not previously provided, into the conversation, could, if we dare repeat the word, "trigger" an FMLA violation. Creating a dispute about whether the employee's condition allows her to perform some essential function of the job can lead to a genuine dispute as to whether a particular aspect of the job is an "essential job function." This "is a factual determination that must be made on a case by case basis based upon all relevant evidence." *Budhun,* No.11-4625 at p.13 quoting *Turner v. Hershey Chocolate U.S.*, 440 F.3d 604, 612 (3d Cir. 2006) (In the ADA context).

CONCLUSION

The two major lessons arising from *Budhun* are: (1) an employer should always provide the physician, of an employee requesting FMLA leave, with a current job description along with the certification form, or a list of essential functions. (2) The invocation of an employee's right to return to work begins with the doctor's fitness-for-duty certification

providing there are no restrictions. (3) The employer's representative must leave the definition of the employee's ability to return to work with the physician, but continue to seek clarification of any restrictions or health concerns within the confines of the originally supplied job functions.

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