

Drug Addiction/Alcoholism: Federal Court Explains Hospital Employees' Legal Rights.

An African-American hospital unit secretary was fired for excessive tardiness, failure to meet established standards on the unit for prompt transcription of physicians' treatment orders into charts and for one episode of use of profane language in a patient-care area. She had held her same position at the hospital for more than twenty-six years.

She sued for race discrimination, disability discrimination and for violation of her rights under the US Family and Medical Leave Act (FMLA).

The US District Court for the Western District of New York dismissed her claim of race discrimination, finding that her errors and omissions on the job were sufficiently sub-standard to overcome any inference of racial bias as her supervisors' motive in terminating her.

However, as to her disability-discrimination and FMLA claims related to her cocaine addiction and her alcoholism, the court could only discuss the legal parameters which would apply to the case and leave the case open for a final ruling after the underlying factual evidence has been developed more fully.

Chemical Dependency Can Be a Legal Disability

In general terms the law protects an employee from disability discrimination if the employee, number one, has a disability and, two, if the employee is nonetheless qualified for his or her position, with or without reasonable accommodation.

Chemical dependency, that is, drug addiction and/or alcoholism, is a disability. However, the law carves out a major exception to the general rule of protection from disability-discrimination for employees who are currently abusing drugs and/or alcohol.

Errors and omissions on the job, even if they can be traced related to the employee's disability, i.e., the employee's chemical dependency, if they are sufficiently egregious, can be grounds for termination without employer liability for disability discrimination.

Employees suffering from drug addiction and/or alcoholism have certain legal rights.

Chemical dependency is considered a disability protected to some extent by the US Americans With Disabilities Act and the US Rehabilitation Act.

Chemical dependency can qualify as a serious health condition which may entitle some employees to medical leave under the US Family and Medical Leave Act (FMLA).

Employees are entitled to be informed by their employers of their rights under the FMLA, including the right to medical leave if their need for treatment for chemical dependency fits the definition of a serious health condition.

An employee who has an ongoing drug or alcohol problem cannot suffer discrimination for opting to exercise his or her rights under the FMLA.

An employee currently abusing drugs or alcohol is not protected from disability discrimination and can be fired for errors and omissions related to substance abuse.

UNITED STATES DISTRICT COURT
NEW YORK
September 1, 2005

The law looks to the moment of actual termination to determine whether an employee is a current drug or alcohol abuser, not to the time the employee committed the errors or omissions in question for which the employer has sought to terminate the employee.

The rationale is to protect employees who voluntarily elect to seek treatment or rehabilitation. An employee cannot suffer consequences for asking for FMLA leave for a chemical dependency problem. An employee who successfully completes a treatment or rehab program or supervised program of recovery, and who is no longer currently abusing drugs or alcohol at the time of termination, would be considered a victim of disability discrimination, even if the employee's past errors or omissions would have justified termination and the employee was actively abusing substances at the time of the errors and omissions.

The court acknowledged that an understanding of the legal rules in this area might motivate employers to terminate substance abusers right away when errors or omissions justifying such action come to light. That course of action is allowed under the disability discrimination laws and the FMLA.

An employee can be terminated for abusing illegal drugs, even without any relation to errors or omissions on the job, if the employer had an established policy to that effect, applied in a uniform, non-discriminatory manner, which had been communicated to all employees.

Family and Medical Leave Act

Employees who are eligible for medical leave under the FMLA have extensive rights *vis a vis* leave and also have the right to sue if they are not fully informed of their FMLA rights by their employers.

The employee in this case had been on the payroll more than one year and had worked more than 1250 hours in the previous year, satisfying the threshold requirement for FMLA eligibility.

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Drug Addiction/Alcoholism: Court Discusses Hospital Employees' Legal Rights (Cont.)

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US Department of Labor regulations for the FMLA explicitly state that chemical dependency is grounds for an eligible employee to take medical leave, assuming the employee's (or a family member's) chemical dependency meets the criteria of a serious health condition.

The regulations further require employers to notify their employees of their rights under the FMLA.

The upshot is that an employee suffering from ongoing chemical dependency might neglect to apply for FMLA leave to enter treatment or rehab, not knowing that he or she has the right to ask for medical leave for that purpose, and then commit errors or omissions justifying termination, or be caught abusing illegal drugs on or off the job contrary to employer policy, and be terminated, and sue because the employer failed to notify the employee of his or her FMLA rights. Gilmore v. Univ. of Rochester Strong Memorial Hosp., ___ F. Supp. 2d ___, 2005 WL 2105788 (W.D.N.Y., September 1, 2005).

Sec. 825.300 What posting requirements does the Act place on employers?

(a) Every employer covered by the FMLA is required to post and keep posted on its premises, in conspicuous places where employees are employed ... a notice explaining the Act's provisions. ... The notice must be posted prominently where it can be readily seen by employees and applicants for employment.

Sec. 825.301 What other notices to employees are required of employers under the FMLA?

(a)(1) If an FMLA-covered employer has any eligible employees and has any written guidance to employees concerning employee benefits or leave rights, such as in an employee handbook, information concerning FMLA entitlements and employee obligations under the FMLA must be included in the handbook or other document.

US Dept. of Labor Regulations – Title 29, Code of Federal Regulations

Sec. 825.112 Under what kinds of circumstances are employers required to grant family or medical leave?

(g) FMLA leave is available for treatment for substance abuse provided the conditions of Sec. 825.114 are met.

However, treatment for substance abuse does not prevent an employer from taking employment action against an employee.

The employer may not take action against the employee because the employee has exercised his or her right to take FMLA leave for treatment.

However, if the employer has an established policy, applied in a non-discriminatory manner that has been communicated to all employees, that provides under certain circumstances an employee may be terminated for substance abuse, pursuant to that policy the employee may be terminated whether or not the employee is presently taking FMLA leave.

An employee may also take FMLA leave to care for an immediate family member who is receiving treatment for substance abuse. The employer may not take action against an employee who is providing care for an immediate family member receiving treatment for substance abuse.

Sec. 825.114 What is a "serious health condition" entitling an employee to FMLA leave?

(a) For purposes of FMLA, "serious health condition" entitling an employee to FMLA leave means an illness, injury, impairment, or physical or mental condition that involves:

(1) Inpatient care (i.e., an overnight stay) in a hospital, hospice, or residential medical care facility, including any period of incapacity (for purposes of this section, defined to mean inability to work, attend school or perform other regular daily ac-

tivities due to the serious health condition, treatment therefor, or recovery therefrom), or any subsequent treatment in connection with such inpatient care; or

(2) Continuing treatment by a health care provider.

A serious health condition involving continuing treatment by a health care provider includes any one or more of the following:

(i) A period of incapacity (i.e., inability to work, attend school or perform other regular daily activities due to the serious health condition, treatment therefor, or recovery therefrom) of more than three consecutive calendar days, and any subsequent treatment or period of incapacity relating to the same condition, that also involves:

(A) Treatment two or more times by a health care provider, by a nurse or physician's assistant under direct supervision of a health care provider, or by a provider of health care services (e.g., physical therapist) under orders of, or on referral by, a health care provider; or

(B) Treatment by a health care provider on at least one occasion which results in a regimen of continuing treatment under the supervision of the health care provider.

(d) Substance abuse may be a serious health condition if the conditions of this section are met.

However, FMLA leave may only be taken for treatment for substance abuse by a health care provider or by a provider of health care services on referral by a health care provider.

On the other hand, absence because of the employee's use of the substance, rather than for treatment, does not qualify for FMLA leave.
