

After having twins, employee sees double recovery from employer

by Jodi R. Bohr

Tiffany & Bosco, P.A.

The Family and Medical Leave Act (FMLA) prohibits employers from interfering with employees' substantive FMLA rights or retaliating against employees for exercising their rights under the Act. Interference claims can include allegations that an employer failed to place an employee returning from leave in the same or an equivalent position. So can an interference claim be filed when the employee is placed in the same or an equivalent position but receives different (i.e., less favorable) assignments after returning from leave? That question was addressed in a case we initially reported on in our October 2015 issue, and the answer turned out to be yes (see "Maternity leave: Employer fails to deliver", on pg. 4). So the next question is, what sort of liability can an employer be subject to when it interferes with an employee's FMLA rights?

Recap

Kimberly Isom was responsible for selling JDA Software, Inc.'s software to existing customers and target customers. She was paid commissions for her sales. On December 30, 2010, she informed Debbie Baker, JDA's senior HR manager, that she was pregnant, and her due date was July 3, 2011.

Because she was the first salesperson to take pregnancy leave at JDA, Isom expressed concern over losing account opportunities and commissions. Throughout her pregnancy, she raised her concerns several times with her direct supervisor, Brad Bell, Baker, and, ultimately, the company's in-house general counsel.

Although the company had approximately six months to answer Isom's questions and address her

concerns, it failed to determine how her commissions and accounts would be handled before she gave birth to twins and began her FMLA leave. And although she indicated that she would be willing to return from leave early to avoid reassignment of her accounts and a large financial impact on her family, she wasn't informed before Bell reassigned her accounts to another salesperson, resulting in a loss of commissions.

Isom returned to work but was eventually discharged. She then sued JDA for FMLA interference and retaliation. After a trial, the jury returned a verdict in her favor, finding that the company had interfered with her right to take FMLA leave.

The jury awarded Isom \$114,618 in back wages. The Arizona federal court was left to determine whether she was entitled to an award of liquidated (double) damages or whether JDA had acted in good faith and had reasonable grounds for believing its actions were not in violation of the FMLA.

Failure to act doubled liability

Under the FMLA, an employee who succeeds on an FMLA claim against her former employer is presumptively entitled to an award of liquidated damages equal to the amount of employment benefits she was denied or lost because of the employer's FMLA violation. An employer may avoid an award of liquidated damages if it can prove to the satisfaction of the court that the act or omission resulting in the FMLA violation was in good faith and it had reasonable grounds to believe it was not in violation of the FMLA.

In this case, JDA asserted that it had acted in good faith in administering Isom's FMLA request by consulting with HR and legal counsel to ensure

compliance. It also pointed out that because Isom was the first saleswoman in company history to take maternity leave under the FMLA, it had to adjust as the situation unfolded.

The court disagreed that JDA acted in good faith, citing its failure to (1) prepare a written policy that would address Isom's concerns about her return from leave in the six months before she went out on leave; (2) answer her questions or respond to her concerns directly before or even in a timely manner while she was on leave; or (3) afford her the opportunity to return early or give her advance notice before transferring her accounts.

JDA's handling of the situation, the court said, "essentially forced [Isom] to either [forgo] her statutory rights or guess as to the professional consequence, an untenable position that is 'willfully indifferent to the FMLA' and 'not in good faith.'" Consequently, the court awarded Isom liquidated damages in an amount equal to her back wages, for a total award of \$229,236, plus interest.

Plan to be prepared

If you are subject to the FMLA, it's best to have a comprehensive policy for managers to apply and employees to review if they have questions about FMLA leave. You should also address whether your company will have a separate policy governing maternity leave if you offer additional benefits in that regard. Recognize that a policy may not address every circumstance that may arise, and have a plan or consult with counsel about how to respond to unique or varying circumstances.

Rather than ignoring their inquiries, be open with employees when the answers to their questions aren't readily apparent, and be clear that the company is working to answer any questions and concerns. Be diligent in responding to an employee's inquiries and anxieties about her particular situation, especially if it isn't addressed by your policy.

If the employee is in sales, maintain an open dialogue with her to address any worries about account assignments and how commissions will be

paid during and following her leave. Unanswered questions at the beginning of an employee's leave can lead to uncertainty and the perception of mistreatment and may be more costly in the long run (in this case, through double liability).

As this case makes evident, pregnancy leave raises a whole host of concerns in addition to questions about properly handled FMLA leave. Good HR practices and procedures are key to avoiding liability.

Jodi R. Bohr is an attorney with Tiffany & Bosco, P.A. and a contributor to Arizona Employment Law Letter. She practices employment and labor law, with an emphasis on litigation, class actions, and HR matters, and is a frequent speaker on a wide range of employment law topics. She may be reached at jrb@tblaw.com or 602-255-6082.