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REPORTER

SUPREME COURT CLARIFIES RULE REGARDING NOTICE UNDER FAMILY MEDICAL LEAVE ACT

By Jim McCarthy



The Family Medical Leave Act (FMLA) guarantees qualifying employees 12 weeks of unpaid leave each year upon the occurrence of certain events: a disabling health problem; a family member's serious illness; or the birth or adoption of a child. While an employee is on FMLA leave, the employer must maintain the employee's group health coverage. More importantly, the employer must reinstate the employee to his or her former position or an equivalent position upon the employee's timely return from leave. The FMLA makes it unlawful for an employer to "interfere with, restrain, or deny the exercise" of these rights. Congress also encouraged employers to adopt more generous leave policies. As long as these policies meet the FMLA's minimum requirements, leave taken may be counted towards the 12 guaranteed weeks.

With this statutory structure in place, the Secretary of Labor issued regulations requiring employers to inform their workers about the leave granted under the company's plans. The regulations made it the employer's responsibility to tell employees that an absence will be counted against the 12 weeks available for FMLA leave. Employers must give written notice of the designation of the absence as FMLA leave, along with detailed information concerning the employee's rights and responsibilities under the FMLA, "within a reasonable time after notice of the need for leave is given by the employee — within one or two business days if feasible." 29 CFR § 825.301(c).

The regulations adopted by the Secretary of Labor laid a potential trap for unwary employers. If the employer failed to give the required notice that an absence would be counted against FMLA guaranteed leave, the absence would not count against the employee's FMLA entitlement. 29 CFR § 825.700(a). In other words, if the employer

failed to give notice to the employee that the leave, whether paid or unpaid, counted toward the FMLA entitlement, the employer was required to provide the employee with the guaranteed 12 weeks even if the lack of notice would not have affected the employee's decision to take leave. This could theoretically expand the availability of leave for an employee if the employer failed to give notice that the leave would count against FMLA. If the employer terminated the employee thinking that the employee had exhausted the FMLA leave, the employer was also liable for back pay, reinstatement, as well as an additional 12 weeks of unpaid leave. In other words, a generous employer could be punished because it failed to provide timely notice of the FMLA designation and thus could be denied credit for leave granted before the notice.

On March 19, 2002, the United States Supreme Court decided that this trap was not authorized by the FMLA. The Court declared this regulation invalid because it relieved employees of the burden of proving any *real* impairment of their rights or any resulting prejudice. The Court observed that the employee had not shown that she would have taken less leave if she had received the required notice. Now, the employee must prove that the failure to give notice of his or her FMLA rights prejudiced or damaged the employee before the employer can be found liable under the FMLA.

Although the Court has struck down the regulation, we nonetheless encourage employers to give notice to their employees that the leave granted counts towards the FMLA entitled leave. Such notice will preclude any subsequent claim. However, if the employee does make a claim of lack of notice, the employee must now prove prejudice and harm and cannot rely upon the presumption created by the regulation. If you have any questions about the applicability of the FMLA or if you need materials to assist you in administering the FMLA requirements, please contact us.

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SUPREME COURT NARROWS DEFINITION OF DISABILITY

by Cynthia Gibson



The Americans with Disabilities Act (“ADA”) requires covered employers to provide reasonable accommodations to the known physical or mental limitations of an otherwise qualified individual with a disability, unless such employer can demonstrate that the accommodation would impose an undue hardship. The ADA defines a “qualified individual with a disability” as “an individual with a disability who, with or without reasonable accommodation, can perform the essential functions of the employment position that such individual holds or desires.” In turn, a “disability” is a physical or mental impairment that substantially limits one or more of the major life activities of such individual; or a record of such an impairment; or being regarded as having such an impairment.

Recently, the United States Supreme Court clarified and narrowed the scope of the ADA. To qualify as disabled, an employee or potential employee must show: (1) he/she has a physical impairment; (2) the impairment limits a major life activity; and (3) the limitation on the major life activity is “substantial”. Focusing on the word “substantial”, the Court explained that the impairment must be to activities that are of central importance to daily life. One such category of impairment would be manual tasks. However, the manual tasks need not be limited to the performance of the task necessary to perform the job. In other words, the employer may look to the physical ability of the employee or potential employee to perform other manual tasks central to major life activities to demonstrate that the employee or potential employee is **not** disabled.

In the case before the Court, the employee complained that she was unable to perform the tasks necessary for the assigned job. The employee had been diagnosed and treated for carpal tunnel syndrome. As a result, she was unable to perform any repetitive work with wrists or elbows, unable to work with her arms extended above her shoulders for extended periods of time and unable to use vibrating or pneumatic tools. As a result, she could not perform the essential functions of her position and was fired. The employee argued that because she was limited in the major life activities of performing manual tasks and working she was “disabled”.

Focusing only on such tasks, the Supreme Court said, impermissibly narrowed the definition of “disabled”. Instead, the Court required the claimant under the ADA to prove that he/she lacked the ability to perform manual tasks central to other major life activities as well. For example, if the claimant can perform manual tasks such as gardening, cleaning, driving, then the claimant is not disabled. However, each case must be decided on its facts.

The decision of the United States Supreme Court substantially narrows the scope of the protections afforded by the ADA. Now, claimants must show that the impairment limits their ability to perform major life activities. Simply being unable to perform the work assigned will not necessarily mean the employee is disabled. Employers may now insist that they have proof of impairment of other major life activities associated with the performance of such tasks. For example, if an employee complains that he/she is unable to perform a manual task required for performance of the job, the employer may inquire if the employee is able to perform other manual tasks at home. Just because he or she cannot perform the job does not mean he or she is physically impaired.

IRA CREDITOR PROTECTION

by Steve Kisling and Bob Brant



Under the federal pension law (ERISA), assets of a qualified retirement plan such as a pension or profit sharing plan are generally protected from creditors (this protection does not apply to plans that cover only the sole owner and owner's spouse of a business or only the partners of a partnership or any spouse of any such individuals). This protection from creditors under ERISA, however, does not extend to IRAs. As a result, many states, including Ohio, have enacted laws to provide IRA creditor protection under state law. A recent case affirmed by the U.S. Court of Appeals for the Sixth Circuit (of which Ohio is a part) has raised some question as to whether these state laws adequately protect IRAs from creditors. The case, *Lampkins v. Golden*, arose out of the state of Michigan. Lampkins was a participant in the qualified pension and profit sharing plans maintained by Golden's company. Lampkins filed a suit under ERISA to recover her benefits under the retirement plans because Golden refused or was unable to pay such benefits. Lampkins prevailed in this ERISA action, but when she attempted to collect her money, Golden claimed that he had no assets other than those that he had placed in his Simplified Employee Pension (SEP-IRA). Golden argued that the assets in his SEP-IRA were protected from Lampkins' collection efforts under Michigan law. The Michigan law is similar to the law in Ohio which grants general creditor protection to IRAs. The Court

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disagreed with Golden stating that the Michigan law was preempted (invalidated) by ERISA which affords no creditor protection to SEP-IRAs. Therefore, the Court ordered that amounts held in the SEP-IRA should be liquidated and transferred to Lampkins in the amount necessary to satisfy her judgment against Golden.

While the *Lampkins* case raises some concerns about whether state law adequately protects IRAs, we believe that the decision only affects creditor protection with respect to SEP-IRAs and not traditional or rollover IRAs. The Court in *Lampkins* indicates that ERISA preempts any state law which relates to an "employee benefit plan" as defined under ERISA. The term "employee benefit

plan" under ERISA is a plan which is established or maintained by an employer which provides retirement income to employees. A SEP-IRA is an employer sponsored plan providing retirement benefits for employees of the employer.

However, a traditional IRA (into which an individual can make annual contributions subject to certain limitations) and a rollover IRA (an IRA which is the recipient of proceeds rolled over from a qualified retirement plan) are not sponsored by an employer, but rather are maintained by the IRA owner. Therefore, we believe that a state law (such as the one in Ohio), to the extent it provides creditor protection to traditional and rollover IRAs, should not be preempted by ERISA. However, it remains to be seen what the effect of the *Lampkins* case will be if it is appealed or if similar issues are raised in other cases. As a result, although we believe that it is likely that the traditional and rollover IRAs will continue to be afforded creditor protection pursuant to Ohio law, this is no longer an absolute certainty.

ATTORNEY PROFILES

Wijdan Jreisat Named Partner



An attorney with the firm since her admission to the bar in 1994, Ms. Jreisat's practice is concentrated in civil litigation with an emphasis on commercial and employment litigation. She also represents and advises clients in a variety of employment matters ranging from the hiring, discipline and termination of employees to employment practices and representation before administrative agencies.

Ms. Jreisat is a graduate of the University of Virginia School of Law.

Bill Hayden Joins KTBH



William T. Hayden brings more than twenty years of experience to the firm in the areas of workouts and financial restructurings, corporate bankruptcy and debtor/creditor relations.

He will head the creditors rights and bankruptcy practice group at the firm.

Prior to joining KTBH, he was a partner with Cohen, Todd, Kite and Stanford where he was involved in the reorganization proceedings of Federated Departments Stores and Eagle-Picher Industries, Inc.

Additionally, he brings considerable experience in business matters related to family businesses and closely-held enterprises. He also serves The United States District Court for the Southern District of Ohio as Special Master of The Fernald Settlement Fund and is a director of The Midland Company and CenterBank.

A resident of Anderson Township, Mr. Hayden is a member of the American Bankruptcy Institute, The American Bar Association, The Ohio State Bar Association and the Cincinnati Bar Association.

Effective January 1, 2002 upon successful completion of a comprehensive examination, attorneys may publicize themselves as "Certified Tax Specialists". We are happy to report that both **Bill Russo** and **Jody Brant** successfully completed that examination and are officially "Certified Tax Specialists". Based upon the report published by the Ohio State Bar Association, there is currently only one other attorney in the Greater Cincinnati area to have earned this designation.

Cynthia Gibson has presented programs at the following events: Executive Women's International – *The FMLA and ADA: An Overview and Case Studies*; University of Cincinnati HIPAA Compliance Team – *Privacy: Recent Developments Under HIPAA*; Council on Education – *Navigating Tricky Issues Under the ADA*. Cynthia was also a presenter at the Cincinnati Bar Association's Annual Labor and Employment Law Seminar in May, speaking on ethical issues for employment lawyers.

Andy Berger and **Tedd Friedman** handled the purchase of a riverboat casino in Mississippi.

Bob Pitcairn and **Laura Hinegardner** recently obtained a defense award on behalf of a publicly traded company in a multi-million dollar commercial arbitration.

Steve Kisling is currently serving as Chair of the Employee Benefits Committee of the Cincinnati Bar Association and has been reappointed to the Board of Trustees of the Cincinnati Bar Foundation.

Bob Brant and **Steve C. Kisling** recently represented the shareholders of a Cincinnati-based, family owned business in connection with a sale to a public company.

Bob Pitcairn and **Wijdan Jreisat** recently defeated class action certification in two separate lawsuits that were brought as alleged consumer class actions.

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