

Employment Law & HR Update

Solving Employee Problems Before They Happen

by

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Holidays Count As FMLA Leave

In Mellen v. Trustees of Boston University, No. 07-1151 (1st Cir 09/21/2007), Linda Mellen had worked for Boston University since 1977 and became Financial Manager for the School of Public Health (SPH) in 1998. In September 2002, Frances Drolette was hired as the SPH's Associate Dean for Administration and Finance and served as Mellen's direct supervisor. However, almost from the very beginning, there was a considerable amount of friction between the two.

On July 17, 2003, Mellen applied in writing for FMLA leave so that she could care for her ailing mother. Mellens requested to be off on FMLA leave from August 4 through October 3 and, if necessary, again from October 28 through November 18. In a letter dated July 31, 2003, BU's Director of Personnel, George Snowden, approved Mellen's request for leave. However, Snowden also informed Mellen in this letter that she would be required to comply with all of BU's return to work policies. If she did not return to work on these approved dates, BU would consider her failure to return to work as a voluntary resignation.

On October 1, 2003, after her first block of leave was almost up, Mullen sent an email to Drolette stating that her mother's situation had not improved and that she needed to use her second block of FMLA approved leave. Drolette responded to Mellen by telling her that she would have appreciated it if Mellen had told her earlier that she needed to use this second block of leave. In a letter dated October 24 from Drolette to Mellen, Drolette expressed her concern over Mellen's lack of professionalism, responsibility, and clarity in failing to let her know earlier of Mellen's desire to use this second block of FMLA time. This letter also referred to problems with Mellen's performance at work.

In a subsequent letter dated October 23, 2003, Mellen informed Drolette that she would not be returning to work on November 19 but would instead return on November 20, noting that she had extended her leave period by one day in light of a November 17 internal holiday granted by BU's Trustees. In a letter dated October 29, Drolette stated

that BU's holidays did not serve to extend an employee's allowed FMLA leave and she therefore expected Mellen back at work on Wednesday, November 19.

However, Mellen did not return to work on November 19. Nor did she call or communicate to BU on November 19 any request for extended leave. Mellen also did not show up for work on November 20, or on any date after that. Instead, Mellen sent a letter to BU dated on November 19, 2003 stating that she was afraid to return to work due to what she described as Drolette's threatening letter of October 24. On November 20, Mellen's lawyer sent a letter to BU reiterating Mellen's fear of returning to work.

Meanwhile, Drolette sent to Mellen a letter dated on November 20 informing her that pursuant to the terms laid out in George Snowdon's July 31 letter, which required her to comply with all of BU's call off and return to work procedures while on FMLA leave, BU was considering Mellen's failure to return to work on November 19 a voluntary resignation.

Mellen sued BU and Drolette personally in federal district court, claiming that BU and Drolette interfered with her substantive rights under the FMLA by miscalculating her leave period. On October 18, 2005, the district court awarded summary judgment to BU.

In reaching its decision, the district court determined that Mellen's FMLA leave had been properly calculated because holidays that fell within her leave period were properly counted against her FMLA leave under 29 C.F.R. § 825.200(f). The court also determined that even if BU had improperly calculated Mellen's leave, Mellen needed prior approval for extending her FMLA leave and should have requested the additional day off from work rather than just failing to show up for work on November 19.

Mellen appealed this decision to the First Circuit Court of Appeals.

In reviewing this case, the court of appeals first looked at Mellen's argument. Mellen contended that she was denied the full number of FMLA days owed to her because BU did not extend her leave to account for three holidays that fell within it (Labor Day, Veterans Day, and the November 17 BU internal holiday). Mellen argued that only the days she *actually missed* from work and not the holidays that fell within her FMLA leave should be counted towards her FMLA usage. The court then looked to the FMLA's regulations in 29 C.F.R. § 825.205(a), which state:

If an employee takes leave on an intermittent or reduced leave schedule, only the amount of leave actually taken may be counted toward the 12 weeks of leave to which an employee is entitled.)

However, BU countered with another regulation which provided that in calculating the amount of FMLA leave taken, holidays occurring within a week taken as FMLA leave *have no effect*. (29 C.F.R. § 825.200(f))

The court recognized that there was not any precedent relating to the consequences of an employee taking FMLA leave in a period of a week or more when this period of time includes a holiday. Therefore, whether holidays are to be counted against FMLA leave when taken in an interval of a week or more is a question of first impression.

However, the court reasoned that the FMLA regulations actually fit together very nicely here. As BU points out, Section 825.200(f) defines the amount of leave used by an employee [f]or purposes of determining the amount of leave used . . . the fact that a holiday may occur *within the week taken* as FMLA leave *has no effect*.

In turn, Section 825.205(a) provides that for employees taking FMLA leave, only the amount of leave *actually taken* may be counted against the twelve-week entitlement. Therefore, if an employee's full week of FMLA leave includes a holiday, Section 825.200(f) states that the amount of leave used *includes the holiday*. Nothing in Section 825.205(a) changes this result. Therefore, the court held that BU properly calculated the amount of time allotted to Mellen's for her FMLA leave to include those holidays that fell within her approved leave.

Secondly, the court of appeals also agreed with the district court that Mellen did not provide sufficient notice to BU of her desire to extend her leave in accordance with their policies and procedures.

When Mellen originally asked for time off, she agreed that her leave would extend until November 18 only if needed. Mellen did nothing to even suggest that the FMLA leave period would be inadequate. She never requested any family-related leave beyond that already granted by BU. Even though Mellen informed Drolette in her letter of October 23 that she believed the BU internal holiday on November 17 extended her leave by a day, BU rejected her position. Mellen said nothing to BU in return. Disagreeing over a return date does not constitute a request for, or demonstrate the need for, any additional leave.

Therefore, not only did Mellen fail to calculate her time off for FMLA leave correctly, but she also failed to comply with BU's return to work and time off policies and procedures and was therefore legally terminated.

WHAT DOES THIS MEAN TO HUMAN RESOURCES?

This is a very favorable decision for employers. Not only does the court help to ease the administrative burden of the FMLA by allowing employers to include holidays in an employee's approved FMLA leave, but it also reiterates that employees must comply with their employer's time off procedures and practices. Failure to do so may have disastrous consequences for employees.

This case also exemplifies the age old adage:

The more you know about the law, the more you appreciate your employer.

Employees, such as Ms. Mellen, snub their nose at their employers and create these situations because they think the law is on their side. Unfortunately, there are also more than enough incompetent attorney's running around out there who do not really understand employment law, such as with Ms. Mellen's attorney, Harry C. Beach, who do nothing but encourage these types of situations because they too really do not understand the law and these regulations. The answer: Educate...educate...educate.

U.S. Supreme Court: Individuals May Sue 401(k) Plan Sponsor under ERISA

In LaRue v. DeWolff, Boberg & Associates, Inc., et. al., No. 06-856 (February 20, 2008, U.S. Supreme Court), James LaRue sued his former employer, DeWolff, Boberg & Associates, when it failed to change his 401(k) investments as he had requested before the stock market took a plunge in 2001 and 2002. LaRue claimed that Dewolff's error caused his 401(k) account to lose approximately \$150,000.

LaRue filed suit against DeWolff, claiming that its error constituted a breach of fiduciary duty in violation of ERISA.

However, the district court dismissed LaRue's claim. LaRue then appealed to the Fourth Circuit Court of Appeals, which held the same. In reaching its decision, the court looked to a Supreme Court case decided in 1985, Massachusetts Mutual Life Insurance Company v. Russell, 473 U.S. 134 (1985).

In Russell, the U.S. Supreme Court held that Section 502(a)(2) of ERISA acts to "protect the entire plan, rather than the rights of an individual beneficiary." The appeals court then held that LaRue's lawsuit was "personal" and it was "skeptical that plaintiff's individual remedial interest can serve as a legitimate proxy for the plan in its entirety."

Russell then appealed to the U.S. Supreme Court, who reversed the lower court's decision and held for LaRue. In reaching its decision, the Court reasoned that the Russell decision was based on the employer's fiduciary obligation to "the entire plan" based upon a defined benefits plan, which is quite different from LaRue's situation which involves a defined contribution plan.

(A defined benefit plan gives a certain level of pension benefits for every year of service. However, in a defined contribution plan, employees contribute their own money into the plan, which is then invested for them individually, as in a 401(k) plan.)

The Court explained that when ERISA was enacted and when the Russell case was decided, most people who had pensions in America had defined benefit plans. However, today, "defined contribution plans dominate the retirement plan scene."

When the Court was referring to ERISA only protecting the “entire plan” in Russell, it was referring to a plan in which everyone received the same level of benefits depending on their years of service, which accurately reflected the application of ERISA’s fiduciary obligation to defined benefit plans at that time. However, when viewed in light of defined contribution plans, Section 502(a)(2) of ERISA requires a different interpretation, the Supreme Court ruled.

Therefore, the Supreme Court held that Section 502(a)(2) of ERISA does in fact authorize individuals to recover from their employers and/or retirement plan administrators for fiduciary breaches that harm an individual account even if the overall plan is not affected.

WHAT DOES THIS MEAN TO HUMAN RESOURCES?

In a time of volatile markets, it is absolutely crucial that an employer’s systems for making changes to employees’ 401(k) accounts are handled in a uniform and expeditious manner. Also, educating employees regarding what processes are in place for their accounts and how to use these accounts are also very important factors to address. If not, employees now have the capability to sue their defined contribution plans individually.

For More Information on these and other various issues, as well as how to best protect your organization, please feel free to contact Scott directly at 614-367-0842 or through his website at www.scottwarrick.com.

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