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Alternative Theory for FMLA Is Suggested

EMPLOYMENT LAW

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Special to the Legal

The 2nd U.S. Circuit Court of Appeals has invalidated a U.S. Department of Labor regulation designed to prevent an employer from challenging an employee's eligibility for a leave of absence under the Family and Medical Leave Act, once eligibility is conferred.

In *Woodford v. Community Action of Green County*, (2d Cir. Oct. 10, 2001), the court joined the 7th and 11th Circuits in rejecting the regulation, which would have permitted an unqualified employee to gain the benefits of the act.

The court opined that the regulation impermissibly altered the statute's qualifications. However, it acknowledged that its decision may nevertheless frustrate the purpose of the FMLA. In light of this dichotomy, the court suggested an alternative theory of relief to future claimants.

A brief review of the factors for qualification under the FMLA is helpful for a better understanding of the decision and the alternative relief suggested. When Congress enacted the FMLA in 1993, it became the first federal act to mandate that all employers with 50 or more employees provide a leave of absence for an employee who has a serious health condition, who is approaching childbirth, or who needs to care for an ill family member.

Under the act, such an eligible employee would be permitted to take up to 12 weeks of unpaid leave, with the assurance that the job, or a substantially similar one, would be available upon the employee's return to work.

To qualify for eligibility, the employee requesting the rights provided by the act must

have worked a minimum of 1,250 hours during the 12 months prior to the point of time when the request for the leave is made (29 U.S.C. Section 2611(2)(A)(1993). The employer may also designate certain employees "key employees." By doing so, the employer is given the right to deny reinstatement to such designated employees if their leave of absence would cause a "substantial and grievous economic injury" to the employer (29 U.S.C. Section 2614(b)(1)(A)(1993).

The Labor Department promulgated a regulation that expanded the rights of the employee (29 C.F.R. Section 825.110(d)). This regulation has spawned some litigation and caused a number of courts to decide its validity, because the act does not provide for variances from its specific provisions regarding qualification for eligibility. The pertinent portion of the regulation is as follows:

"If the employer confirms eligibility at the time the notice for leave is received, the employer may not subsequently challenge the employee's eligibility ... [or] if the employer fails to advise the employee whether the employee is eligible prior to the requested date the leave is to commence, the employee will be deemed eligible."

The salient facts of the *Woodford* case are that an employee who held the position of director for 12 years requested a leave of absence from her employer on the basis of her condition of personal stress and depression.

After making the request, the employer gave her an official form that indicated on its face that she was eligible for the leave under the FMLA.

However, after this confirmation, the employer gave notice to the employee that she would not be returned to her former position because she was designated a key employee. She was also told that she was ineligible because she had not worked the requisite num-

ber of hours in the preceding year.

Later, when the employee, according to her employer, did not return to work in a timely manner, she was summarily discharged. The employer then hired another person for her position.

These facts gave focus to the question regarding the validity of the regulation by the Labor Department. The *Woodford* court noted that the 7th Circuit, in *Dornmeyer v. Comerica Bank-Illinois*, 223 F.3d 579 (7th Cir. 2000), and the 11th Circuit in *Brungart v. Bellsouth Telecommunications, Inc.*, 231 F.3d 791 (11th Cir. 2000), had previously examined this regulation and its validity regarding facts similar to those of its case.

The courts, in both cases, rejected the validity of the regulation because, they said, it would impermissibly widen the statutory definition of an eligible employee. The *Woodford* court agreed with this reasoning and opined that congressional intent was clear as to eligibility under the FMLA and that because the regulation expanded coverage, it contradicted the expressed intent of Congress and, thus, was invalid.

However, this determination that the regulation lacks efficacy to effect the question of eligibility in these cases, falls short of providing a judicious result in all instances.

It is noteworthy that in a District Court opinion, *Miller v. Defiance Metal Prods. Inc.*, 989 F. Supp. 945 (N.D. Ohio 1997), the court gave consideration to this question, and chose to hold that the regulation did not contradict the FMLA's eligibility requirements. The court reasoned that the regulation only concerned itself with "notice requirements" and did not expand coverage. Therefore, it was deemed a valid provision by that court because the Act does not address the process for notice to the employer.

The court also determined that the regulation was reasonable because once the employee

learned that the request was accepted, the mind of the employee could then turn to the needs of the family. Accordingly, the court reasoned that it comported with the statutory purpose of the FMLA.

The *Woodford* court noted the lone dissenting opinion of the *Miller* case, but, in tandem with the other courts, concluded that the regulation unfairly favors employees who may have been erroneously conferred eligibility under the act.

The court did not want to create an inequity in the workplace between employees who were legitimately qualified and those who gained benefits because of an employer's error. Accordingly, the regulation was rejected.

But, by way of dicta, the *Woodford* opinion addresses the issue with some compassion and notes that its own rejection of the claim does cause a detrimental impact upon the employee, who relies on the employer for job security assurances. Citing the *Dormeyer* decision, the court notes that "if detrimental reliance were

required ... the regulation could be understood as creating a right of estoppel ... and such right might be thought both consistent with the [FMLA] and the reasonable method of implementing it, and so within the [Department of Labor's] rulemaking powers."

The *Woodford* court then significantly notes that an employer who misleads an employee concerning entitlement under the FMLA, might, if the employee reasonably relied upon it and was harmed thereby, be estopped to plead the defense of ineligibility.

It further opined that "future employees who relied to their detriment upon the assurance of their employer that they qualified for leave under the FMLA, may have recourse to the doctrine of equitable estoppel even without an enforceable regulation protecting their right to rely upon an employer's notice of eligibility."

Without giving any solitude to the claimant who was seeking relief, the court remarked that had the plaintiff raised the issue of equitable

estoppel on her appeal, it would have willingly considered it a matter of law.

Because the court did not have to consider this issue, relief for future claimants with similar factual situations will have to be provided by an amendment to the FMLA by Congress or by an amendment to this regulation by the Labor Department. That is, one which will be deemed valid by the judiciary.

In the meantime, however, claimants should assert the doctrine of equitable estoppel when faced with a challenge of eligibility from their employer, if reliance is at issue.

It is abundantly clear from several courts that have addressed this issue that claimants seeking rights under the FMLA should assert the equitable doctrine of estoppel, if prior assurances of eligibility were given by the employer and if the employee acted in reliance thereof.

It is hoped that this alternate theory of relief will produce a more justiciable result. •