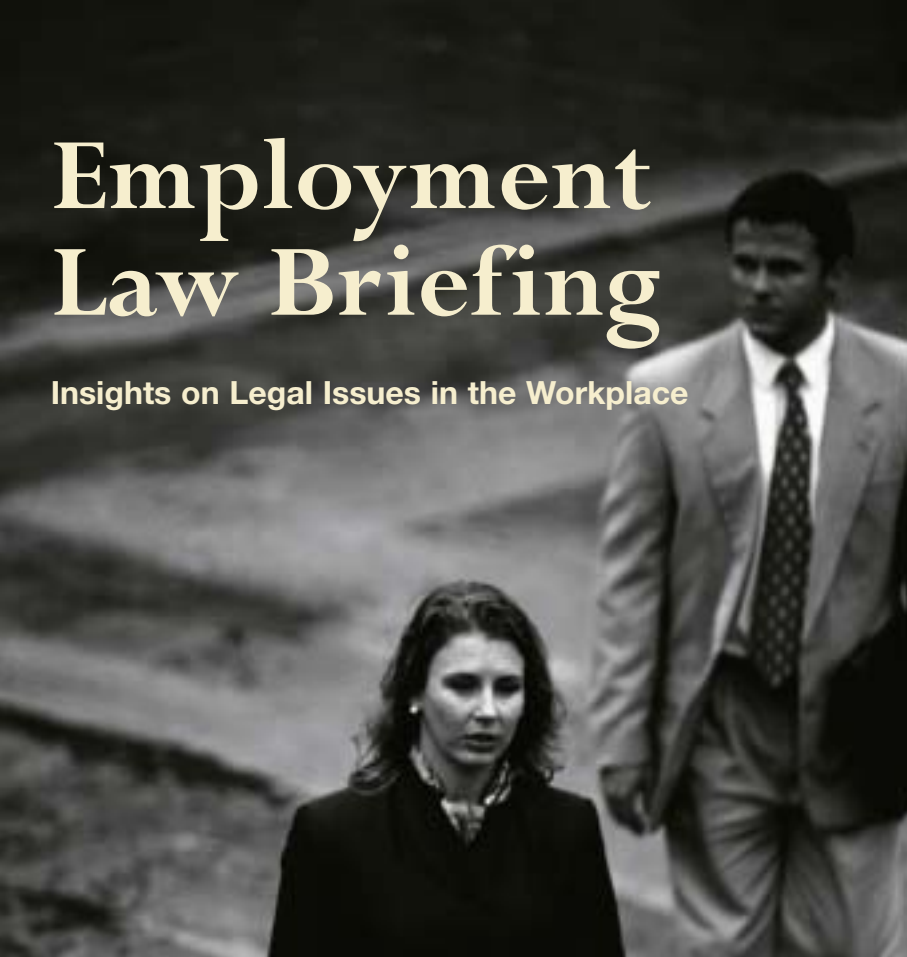


Employment Law Briefing

Insights on Legal Issues in the Workplace



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Complying With the FMLA Just Got Easier

Employers may now find complying with the Family & Medical Leave Act (FMLA) less onerous, thanks to a recent U.S. Supreme Court decision, *Ragsdale v. Wolverine WorldWide Inc.*

The FMLA applies only to companies with 50 or more employees. It guarantees eligible workers 12 weeks' leave during a one-year period for:

- ☛ *Serious health problems,*
- ☛ *Serious illness of a family member, or*
- ☛ *Birth or adoption of a child.*

Employers must maintain the worker's group health coverage during the 12 weeks' leave and hold the worker's job. In administering the FMLA, the Department of Labor (DOL) issued a rule requiring employers to notify their workers when the clock starts ticking on the 12 weeks of FMLA leave. If companies fail to do so, they can't count against the 12 weeks any medical absence a worker has taken.

Let's take a look at the facts of the case before the Court — and how it ruled.

The Case Begins

A year after a worker took a job in a shoe factory, she was diagnosed with cancer that required surgery and months of radiation therapy. The company held her job for her — and for six months paid her health benefits — while she was on medical leave for 30 weeks. But when she asked for more time to complete chemotherapy, the company refused. When she failed

to return to work, the company terminated her employment. She filed suit in federal court.

The worker alleged that she was still entitled to 12 weeks' FMLA leave, because the company had never notified her that 12 weeks of her absence would count as her FMLA leave.

The Plot Thickens

The company asked the trial court to rule in its favor as a matter of law without a trial because the facts were undisputed. The company conceded that it had failed to specifically notify her that her absence would count as FMLA leave. But it argued that it had more than complied with the act by giving her 30 weeks' leave, more than twice what the FMLA required. The trial court sided with the company, and the 8th U.S. Circuit Court of Appeals affirmed.

On appeal, the U.S. Supreme Court noted initially that courts must give considerable weight to DOL rules interpreting a statute. But a rule can't stand if it is arbitrary, capricious or manifestly contrary to the statute.

The Court Is Divided

In a five-to-four decision, the Court found the rule altered the act's thrust because it "relieves employees of the burden of proving any real impairment of their rights." A dissenting opinion stated that the rule was "justified in requiring individualized notice," because "nothing in the act constrains the DOL's ability to secure compliance with that requirement by refusing to count the leave against the employer's statutory obligation."

The majority found that the rule unfairly punished an employer's failure to provide timely notice of the FMLA designation by denying it any credit for leave it had granted until notice was given. The Court noted that the penalty was thus unconnected to any prejudice the employee might have suffered from the employer's lapse. The fact that the employee might have acted in the same manner had notice been given was irrelevant under the rule. Indeed, even if employees had actual notice of their FMLA rights and expected the absence to count against the 12-week entitlement, the employer would still be required to grant an additional 12 weeks' leave under the rule.

The Court acknowledged that in some circumstances, failure to notify an employee of FMLA rights might prejudice an employee. For example, employees who didn't know that the FMLA allows them to take intermittent leave might take the 12 weeks all at once and have none left for a future emergency. But the rule doesn't distinguish between a case involving prejudice to an employee and the case here where the employee was not prejudiced. The Court noted that even if the

company had notified the employee of her FMLA rights, she still would have taken the entire 30 weeks off.

So the Court held that the rule was invalid. But it didn't decide the validity of the rules' notice-and-designation requirements or whether other means of enforcing them might be consistent with the act.

What Employers Should Do

The DOL is expected to revise its notice rules to conform to the Court's decision. Our crystal ball tells us that the revised rules will probably still require employers to give written notice to workers of their FMLA rights — and to designate leave as FMLA or non-FMLA leave. But the failure to give notice won't result in an automatic additional 12 weeks' leave. Rather, additional leave would be required only if employees establish prejudice or impairment of their FMLA rights.

In light of this, we recommend that employers continue to comply with the rules requiring notice and designation. 🏠

Court Upholds Company's Hairstyle Rule

How far can an employer go in enforcing its policy on acceptable employee hairstyles? Pretty far — as a UPS driver with dreadlocks found to his chagrin after he failed to conform.

Let's take a look at what happened in *Eatman v. United Parcel Service*.

No Ponytails, Green Hair or Dreadlocks

UPS required its drivers to maintain "businesslike" hairstyles. Its labor-relations manager interpreted the guidelines to bar ponytails, green hair, carved shapes and dreadlocks for male drivers. But he accommodated drivers with unacceptable hairstyles by allowing them to wear hats while driving.

When an African-American driver began wearing his hair in dreadlocks, his supervisors told him that all employees with locked hair had to wear hats — either a woolen or baseball cap. But the driver alleged that the baseball cap was too small and the woolen hat too hot in warm weather and caused his hair to break off. He refused to wear the hat and UPS discharged him.

Discrimination Alleged

The driver filed suit, alleging that he was discharged because of his race and religion in violation of Title VII. He claimed that he wore his hair in locks as “an outward manifestation of an internal commitment” to his Protestant faith as well as his “Nubian belief system”; that “countless religious texts and the Bible” taught him that hair was divine; that Jesus wore his hair in locks and this was a way for him to emulate Jesus; and that wearing locks constituted a connection to his African identity and heritage.

In his deposition, he admitted that wearing locks was a “personal choice” and not mandated by his Protestant faith. He also admitted that his Nubianism — though in part a celebration of hair — didn’t mandate an uncovered head or punish a covered one.

UPS moved to dismiss the complaint on the ground that the facts were undisputed and the company was entitled to judgment as a matter of law. The court granted UPS’s motion.

No Discrimination Found

First, the court dealt with the issue of racial discrimination. The driver contended that UPS’s guidelines were discriminatory on their face because they singled out African-Americans on the basis of a characteristic that was unique to them.

The court rejected this argument. It noted that even if UPS’s policy applied only to “locked hair” and not to all “unbusinesslike” hair, the driver’s expert witness had admitted that African-Americans were not the only

The court noted that the maintenance of reasonable grooming requirements for employees who deal with the public is a legitimate aspect of managerial control.

persons who can lock their hair. Furthermore, the driver hadn’t shown that UPS differentiated between blacks who locked their hair and nonblacks who locked their hair. The court cited case law holding that Title VII doesn’t bar discrimination based on locked hair: “An all-braided hair style is an ‘easily changed characteristic,’ and even if socioculturally associated with a particular race or nationality” is a permissible basis for distinction in the application of employment practices by an employer.

Thus, the court held that even if UPS’s policy explicitly discriminated against locked hair, it didn’t violate Title VII.

Second, the court held that the driver had failed to rebut UPS’s defense that it discharged the driver for legitimate, nondiscriminatory reasons. The court noted that the maintenance of reasonable grooming requirements for employees who deal with the public is a legitimate aspect of managerial control.



Third, the court dealt with the driver's allegation that managers had made harassing comments about his locks. The court found that he hadn't shown that nonblack employees weren't disciplined for violating the hairstyle guideline. The UPS managers' comments didn't establish that his discharge was based on discriminatory animus. Most of the comments were made by nondecisionmakers and weren't inherently racist because no objective evidence showed that the speaker viewed the driver's hair as related to his race.

Fourth, the court rejected the argument that the policy violated Title VII because of its adverse impact on African-Americans, even though 17 of the 18 drivers in the area who had to wear hats were African-Americans. The court held that the driver hadn't established that the policy adversely affected African-American employees by diminishing their opportunities for company employment and advancement.

Finally, the court dismissed the driver's claim of religious discrimination, noting he had testified that wearing locks was a personal choice and not dictated by his religion. Even if his religion required his locks, he failed to inform UPS that wearing a hat conflicted with his religious practice so that UPS would have an opportunity to accommodate him.

Take Precautions, Not Risks

Although the employer here won this case, UPS could have done some things to avoid being sued. For example, it could have shown more flexibility in hat choice or given the driver a bigger baseball cap. It could have trained its managers to avoid making derogatory comments about hairstyles — something that can only lead to trouble. And it could have limited comments about appearance to whether an employee complied with company policy. If UPS had taken these steps, it probably could have avoided the time and expense of litigation. 🏠

Good Evaluation Leads to Bad Decision

What are the risks for employers that hastily discharge employees without prior warnings? A high-end jewelry firm found out the hard way in *Ames v. Cartier Inc.*

The Facts

Cartier hired a male of Filipino descent as a temporary holiday sales associate in its Fifth Avenue store and made him a regular full-time employee four months later.

Three months after that, in a 90-day performance review, the store rated the employee as satisfactory or higher for attendance, appearance, cooperation, initiative, production, stability and overall. In addition, the store rated him as satisfactory/marginal or marginal for attitude and dependability. He received no unsatisfactory ratings, and the evaluation stated that he had successfully completed his probationary period. The firm transferred the employee at his request to a new Madison Avenue store.

Three months after giving the employee no unsatisfactory ratings, the firm again reviewed his performance. This time it rated him unsatisfactory in attitude, cooperation, dependability, initiative, production, potential and overall — and terminated his employment the next day.

The employee sued the store, alleging discrimination based on sex and national origin. The store argued that because no material facts were in dispute, it was entitled to judgment without a trial.

The Arguments

The employee argued that he could produce direct evidence at trial to prove that the discharge decision was motivated by discrimination. He cited three factors to prove his case.

First, he cited an incident in which a female sales associate had taken over assisting a customer. When he complained to the store manager, she told him that the customer was “Russian and Russian men like to flirt with pretty blondes.” She later added, “From my long selling experience, I feel that some people [can] sell more effectively than others because [they] share certain elements of their lives” with the customer.

Second, he stated that he was the only sales associate not given a key to the display case by the store manager. Third, he alleged that the store manager singled him out for blame for an unclean bathroom.

The court ruled that the second and third factors didn’t constitute direct evidence of discrimination because several valid nondiscriminatory reasons could explain the store manager’s conduct.

The employee alleged that the discharge reasons were merely pretexts for discrimination.

But the first factor was a different matter. The court couldn’t contemplate any legitimate, nondiscriminatory reason that could dispel the inference raised by the conduct.

The court found that the gist of the employee’s allegations was that white female sales associates were to serve the store’s white male customers. The court conceded that “while pandering to customers’ discriminatory preferences could very well help effectuate a sale, employers nevertheless may not discriminate on the basis of their customers’ preferences.”

The Decision

So the court ruled that a trial was necessary because the employee had alleged direct evidence that could permit a jury to conclude that the store maintained a discriminatory sales and employment policy.

The court also held that even if this conduct didn’t constitute evidence of discriminatory motive, the employee was entitled to a trial under the theory that his discharge was pretextual. The store gave five specific reasons for his discharge:

1. *Poor penmanship,*
2. *Mistakenly selling a ring for less than its retail price,*
3. *Constant challenges to the store manager’s directions by citing the Fifth Avenue store’s practices,*
4. *Failure to arrange a display case properly within a reasonable time, and*
5. *Asking the Fifth Avenue store to authorize a discount when his store manager was out of town.*

The employee alleged that these discharge reasons were merely pretexts for discrimination. He pointed out that no other manager had a problem with his handwriting and that someone else had mislabeled the ring. He claimed that he hadn’t challenged the store manager’s directions but had merely responded to her invitation for

staff suggestions by volunteering his experiences at the Fifth Avenue store. He admitted that it took him longer to arrange a display case, but maintained that it was because he was the only sales associate to follow the written instructions they were given. Finally, he stated that because he couldn't call the store manager while she was out of town, he called the Fifth Avenue store.

The court held that if a jury were to believe the employee's explanation of these factors, it could conclude that the cited reasons were merely a pretext for discrimination. The court particularly noted that barely three months before his discharge, the store had rated his overall performance as satisfactory and that he had been given higher scores in several individual skills.

Fire in Haste and Repent at Leisure

What can employers learn from this case? That the store manager acted too hastily in discharging an employee who had completed his probationary period. The store manager should have undertaken progressive discipline with the employee or waited for more egregious conduct before deciding to discharge him.

Many managers dislike giving negative evaluations or disciplinary warnings. But supervisors who give employees good evaluations and no warnings and then discharge them place the company in a difficult position. We can't say it too often: Progressive discipline is essential to avoid — or win — discrimination lawsuits. 🏛️

Supreme Court Denies Back Pay To Wrongfully Discharged Illegal Alien

An employer terminated the employment of an illegal alien for having engaged in prounion activities. The National Labor Relations Board (NLRB) found that his discharge was unlawful and awarded him reinstatement and backpay, its usual remedies. But the U.S. Supreme Court held that the NLRB had overstepped its authority when it awarded backpay (*Hoffman Plastic Compounds Inc. v. NLRB*).

The Immigration Reform & Control Act (IRCA) bars employers from hiring illegal aliens. The Supreme Court found that awarding backpay to illegal aliens conflicted with IRCA's purposes. The Court noted that awarding backpay in a case like this "not only trivializes the immigration laws but also condones and encourages future violations." In fact, the Court found that the possibility of receiving backpay constituted an inducement for illegal aliens to prolong their illegal presence here. The Court held that the other NLRB-imposed remedies — including ordering the employer to cease and desist — constituted a sufficient deterrent against future violations, because future violations could trigger contempt sanctions against employers.

Employers should note that this decision doesn't condone discharging illegal aliens for unlawful reasons — it just limits illegal aliens' remedies. When hiring, employers must comply with IRCA provisions. These include inspecting identification forms and authorizations to work in this country as well as making sure all employees completely fill out I-9 forms.



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We hope you enjoy this edition of the Employment Law Briefing. Our goal is to provide you with articles and information that will assist you in managing the employer/employee relationship, whether you are in the public or private sector. Should you have any questions regarding the topics in this newsletter, or any related employment matter, I would ask that you contact us.

Howd & Ludorf is a law firm which specializes in the representation of clients with complex litigation concerns. The firm's employment practices group focuses primarily on providing assistance to public entities and small to mid-sized manufacturing, high-tech and related industries.

Working with public entities, elected officials, corporations, start-up companies and institutions, Howd & Ludorf is able to provide a protective framework designed to avoid employer/employee disputes when possible, and to facilitate in the resolution of those disputes when necessary by drafting and utilizing:

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- ☛ Employee Handbooks
- ☛ Guidelines for Drug and Alcohol-Free Environments
- ☛ Confidentiality/Non-Compete Agreements
- ☛ Employment Downsizing (RIF Agreements)
- ☛ Sexual/Racial/Religious harassment training/prevention and policies
- ☛ Alternative Dispute Resolution

Our firm works to create legal infrastructures that reduce the potential for problems within the workplace. We work to resolve existing problems with your employees swiftly and effectively. Our focus is on producing measurable and meaningful results that prevent the need for litigation.

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We welcome feedback from you about this newsletter. We believe it is important to continue to apprise our friends, colleagues and clients of legal issues and ongoing changes in this most volatile and important area of law. You may also visit our website, which has recently been modified to include several helpful employment-related pages and sites at www.hl-law.com.

If you have any questions or comments about this publication, or if you know someone who would like to be included in our mailing list, please call **Michael J. Rose** at 860-249-1361 or e-mail me at mrose@hl-law.com.

Very truly yours,

Michael J. Rose