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# Employer Violates FMLA by Terminating Employee Who Requested Leave Extension

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Many employers find it difficult to administer their leave of absence policies within the parameters of the Family and Medical Leave Act.

Some of the pitfalls employers frequently face under the FMLA were highlighted in a recent decision of the 6th U.S. Circuit Court of Appeals, *Killian v. Yorozu Automotive Tennessee, Inc.*, No. 04-6202 (6th Cir. July 20, 2006).

In *Killian*, an employee requested, and received approval for, a medical leave of absence from Nov. 29, 2001, until Dec. 9, 2001, to have surgery. While on leave, the employee's doctor discovered that her condition was more serious than he anticipated, necessitating a follow-up appointment on Dec. 11, 2001, the day after the employee's original return-to-work date. When the employee contacted the company nurse to request an extension of her leave, the nurse reportedly told her, "That's fine. Get a statement, and we'll extend the time."

Under the company's policy, employees requesting leave extensions were required to provide medical recertification prior to the expiration of their original leave. In violation of this company policy, the employee in *Killian* did not submit a

medical certification before her authorized leave expired. When the employee's supervisor contacted her on Dec. 10, 2001, to inquire about her absence, the employee advised him that the company nurse had extended her leave. Later that day, the employee's doctor faxed a medical certification to the company providing that the employee would be unable to return to work before Dec. 17, 2001. When the employee called the human resources department to ensure that it had received her doctor's note, her supervisor terminated her employment.

With regard to the FMLA's notice provisions, the court found that employees may orally advise their employers of their need to take leave and that an employer may only require



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an employee to provide “reasonable notice (i.e., within two business days)” of the need to take additional leave upon changed circumstances.

Based on those provisions, the court in *Killian* found that the employee provided adequate notice of her need for additional leave when she orally requested an extension six days before her authorized leave was set to expire.

In addition, the court pointed out that if an employee fails to give adequate notice of the need to take leave, an employer’s options under the FMLA are limited to waiving the notice requirement or delaying the employee’s leave; not termination.

With regard to the FMLA’s medical certification provisions, the court found that employers must allow employees “at least 15 days” to provide such certifications, including in the case of recertification of an approved leave. As the employee in *Killian* was terminated only six days after she was advised that she needed to submit a medical statement, the employer violated the FMLA.

In reaching this conclusion, the court stated that the company’s policy violated the FMLA to the extent that it required the submission of a medical certification with less than 15 days notice.

Furthermore, the court pointed out that when an employee fails to submit a medical certification in a timely manner, an employer’s sole remedy under the FMLA is to delay the leave – not terminate the employee.

In addition to the pitfalls employers face in following the FMLA’s notice and medical certification requirements, employers frequently face difficulties when an employee is unable to return to work following the expiration of FMLA leave.

The Equal Employment Opportunity Commission maintains that an automatic policy requiring that such employees be terminated violates the Americans with Disabilities Act, as the ADA requires that employers reasonably accommodate individuals with disabilities, and a

leave of absence can constitute a reasonable accommodation in some circumstances.

Therefore, when faced with an employee who is unable to return to work following the expiration of FMLA leave, an employer should consider requiring the employee to submit updated information about his/her medical condition and ability to return to work with or without accommodation.

Once this information has been obtained, the employer can evaluate whether the employee has a disability and, if so, whether any reasonable accommodation is necessary and/or feasible.

In addition to the ADA, employers should consider their past practice when presented with an employee who is unable to return to work following the expiration of FMLA leave. For example, if an employee advises the employer that his/her needs additional leave following the expiration of the FMLA leave, the employer should consider whether it has discharged all other employees whose absences exceeded the amounts allowed by company policy. If not, the employer could create exposure for an FMLA retaliation claim if it terminates the employee who requested an extension beyond the expiration of his/her FMLA leave.

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