MASSACHUSETTS LAWYERS WEEKLY

SJC refines guidance on vacations, medical leave

By: Kris Olson June 13, 2019

Co-counsel for plaintiff

The Supreme Judicial Court in a recent decision has refined its guidance for employers trying to assess whether a vacationing employee is abusing medical leave, practitioners say.

DaPrato v. Massachusetts Water Resources Authority also reaffirms that a mistaken "honest belief" that an employee is abusing his leave will not shield an employer completely from a retaliatory discharge claim.

Had things gone according to plan, plaintiff Richard A. DaPrato would have retired this year from his job as a manager in the MWRA's information technology department at the age of 66.

But an operation in 2015 to remove a nerve tumor from his right foot and a long-planned annual vacation — along with what a Suffolk Superior Court jury found to be a flawed investigation by his employer — conspired to scuttle those plans.

Specifically, the MWRA's human resources director testified that the investigation was launched because she did not think an employee who is seriously ill or disabled would be able to go on vacation. That stance was "incorrect as a matter of law," Justice Scott L. Kafker wrote for the SJC.

Co-counsel for plaintiff

The MWRA's "shock, outrage and offense" was compounded when DaPrato began laying the groundwork to take another round of medical leave to undergo knee surgery that he had postponed to address his foot, the court noted.

The SJC's decision upholds a jury award that the trial judge had modified slightly, which exceeded $1.3 million, not including attorneys' fees, costs and interest. The ruling, Lawyers Weekly No. 10-101-19, can be found here.

'Esler' elucidated

An employer citing a vacation — or a trip to the gym or to the mall — as a defense is a "recurring theme" in Family and Medical Leave Act and other disability cases, according to Robert S. Mantell of Boston, one of the plaintiff's attorneys.

In some cases, employers go so far as to deploy surveillance to catch their employees abusing their leave, he said.

Co-counsel David E. Belfort of East Cambridge said an "important theme" in the decision was that an employer cannot simply assume a sick or disabled employee is abusing medical leave when he or she goes on vacation during protected time off from work.

"The beauty of the decision is it ought to force employers to move a lot more carefully and not jump to conclusions based on their own perceptions, assumptions and biases."

— Rebecca G. Pontikes, Boston

Kafker acknowledged that the SJC's 2016 decision in *Esler v. Sylvia-Reardon* resulted in confusion over just how vacations should be viewed under the FMLA.

In *Esler*, the SJC "emphasized that an employer may not treat the mere fact that an employee went on vacation while on FMLA leave, standing on its own, as grounds for an adverse employment action," Kafker wrote.

The employee in *Esler* had gone on leave due to anxiety, which was not inconsistent with the activity she was found to have engaged in — ice skating in New York City, the SJC concluded.

But *DaPrato* presented a different scenario: an employee with a physical ailment limiting his mobility.

"We clarify today that an employer may validly consider an employee's conduct on vacation — or, for that matter, anywhere — that is inconsistent with his or her claimed reasons for medical leave, when the employer has such information at the time the employer is evaluating whether leave has been properly or improperly used," Kafker wrote.

He then penned perhaps the opinion's most memorable line:

"An employee recovering from a leg injury may sit with his or her leg raised by the sea shore while fully complying with FMLA leave requirements but may not climb Machu Picchu without abusing the FMLA process."

Boston attorney Richard S. Loftus said though he suspects that plaintiffs' attorneys will seek to use *DaPrato* in attempts to justify activities closer to the "Machu Picchu" end of the spectrum, courts will appropriately limit the application of *DaPrato* to its particular facts moving forward.

However, Loftus agreed with the court that the HR director's deposition testimony had been "pretty damning."

"Whenever you are talking about FMLA or reasonable accommodations, hard and fast rules are going to get you in trouble," Loftus said.

Meghan L. McNamara, the lawyer for the MWRA, referred requests for comment to the agency's spokesperson. Ria Convery said the MWRA was disappointed with the decision but did not elaborate on the implications of the ruling.

Constellation of conduct justifies punitives

Attorneys said they were heartened that the SJC effectively rejected the MWRA's argument that the jury's award of punitive damages should be vacated or remitted because its conduct was neither outrageous nor egregious.

"The jury reasonably could have found the manner in which the MWRA treated a long-time employee with no prior history of misconduct to be egregious or recklessly indifferent," Kafker wrote. "The jury could have found that the MWRA was recklessly indifferent because DaPrato's conduct was not inconsistent with the recovery time frame described in the FMLA application."

Kafker listed a number of other facts upon which the jury could have based its punitive damages award, including that the HR officials who recommended DaPrato's termination never gave certain information to senior management.

The MWRA could have checked with DaPrato's doctor to confirm his representations about his medical condition but never did, Kafker noted.

Causation standard not decided

With its decision in *DaPrato v. Massachusetts Water Resource Authority*,

Belfort said the MWRA even could have sent his client out for an independent medical evaluation under the FMLA.

But not only did it not do that, the MWRA never spoke to DaPrato's manager, who was well aware of his vacation, nor did it check the notice it had in its files articulating the nature of his restrictions before it made its termination decision, Belfort said.

While there are mechanisms in the FMLA to allow employers to investigate possible cases of abuse of medical leave thoroughly, "frankly, even if there weren't, the issue would have been so readily cleared up with a phone conversation," said Boston attorney Patricia A. Washienko, who co-authored a brief in support of the plaintiff with Boston attorney Rebecca G. Pontikes.

"The beauty of the decision is it ought to force employers to move a lot more carefully and not jump to conclusions based on their own perceptions, assumptions and biases," Pontikes said.

According to Boston attorney Brian J. MacDonough, employers frequently impose their own non-medical views of what is appropriate in disability-related cases, whether disability discrimination under the Americans with Disabilities Act or Chapter 151B or leave under the FMLA.

Rather than conducting an investigation to reach a determination, the MWRA seemed to have launched its investigation to support a conclusion it had already made, MacDonough said.

For employers, the lesson is that if you are conducting an investigation in order to have a defense in court, you need to make sure it is defensible, Pontikes said.

"The law does not mean that any investigation is fine," she said.

Mantell's colleague, Beth R. Myers, said the SJC in its 2009 ruling *Haddad v. Wal-Mart Stores, Inc.* listed five factors that should be considered to assess whether a defendant employer's conduct had been sufficiently "outrageous or egregious" as to warrant punitive damages.

She said *DaPrato* helpfully outlines a situation in which the "totality of the circumstances" rises to that level.

"You don't have to see some wild action taken against the plaintiff," Myers said.

the Supreme Judicial Court left for another day — and another court — a ruling on the appropriate standard for a retaliation claim under the Family and Medical Leave Act.

Some courts have allowed an employer to be found liable upon a showing that an employee's taking of FMLA leave was a "negative factor" in its employment action. Others have set the bar higher, requiring proof that "but for" the taking of leave, the employment action would not have resulted.

There is "significant uncertainty" in the case law from the federal courts, and the U.S. Supreme Court has provided no definitive guidance, the SJC noted. A Department of Labor regulation is also inconclusive, the court said.

In its amicus brief, the New England Legal Foundation presented an "extensive analysis" contending that the "but for" standard is appropriate, absent express language to the contrary in the statute, the SJC noted. NELF staff attorney John Pagliaro said it was understandable that the court would not think it necessary "to weigh in on what has obviously proven to be, even among federal courts, a very contentious question of federal law."

He said the issue will eventually wind up before the Supreme Court.

"The only question is when and by what route," Pagliaro said, adding that "NELF will be there when that happens."

— Kris Olson

New job doesn't undo distress

The MWRA also unsuccessfully challenged the jury's award of $200,000 for emotional distress, which the SJC said "was supported by the evidence and not greatly disproportionate to the injury suffered."

DaPrato had testified to being a "train wreck" mentally, physically and emotionally as a result of his termination. He said he suffered anxiety, migraine headaches and other health effects.

He spent three months finding a new job, and while that new job paid more, it lacked the job security, paid vacations, and other benefits he enjoyed at the MWRA, the court noted.

Kafker wrote that it was also "reasonable for the jury to infer that a long-term employee, nearing retirement age, who 'loved his job' and was committed to the water quality mission of the MWRA, would suffer emotional distress from wrongful termination of his employment and the need to change his pension and retirement planning."

Pontikes said that aspect of the decision is consistent with the FMLA's recognition that when one loses a job due to retaliation, it is "not just about money." Rather, the law was meant to account for intangibles such as career growth and security.

Though not many FMLA retaliation cases may involve plaintiffs with pensions, MacDonough noted that *DaPrato* provides a "helpful analysis" regarding how damages to offset pension losses should be calculated.

Pontikes said the SJC also seemed to be mindful of the fact that the security of a pension is a key part of the trade-off a public employee accepts when deciding not to seek more lucrative employment in the private sector.

Narrow role for 'honest belief'

The MWRA argued that the trial judge, Douglas H. Wilkins, should have instructed the jury that "an employer is not liable under the FMLA if it discharges an employee based upon an honest belief that the employee had misused FMLA leave, even if that belief is mistaken."

Wilkins explained that "an honest but unconsciously biased decision would [not] absolve the employer from liability."

The SJC said that was correct based on the text of the FMLA, which "provides a specific, narrowly defined role for good faith, honest but mistaken beliefs that have a reasonable basis."

Such beliefs are "pertinent only to the question of [the amount of] damages under the FMLA, not to liability," Kafker wrote, quoting from the 9th U.S. Circuit Court of Appeals' decision in *Bachelder v. America W. Airlines, Inc.*

"It would not make sense to require an employer to prove that its challenged employment decision was done in 'good faith' to avoid mandatory payment of liquidated damages if in fact such a showing would defeat liability entirely," he continued.

Here, Wilkins had found that the MWRA's investigation had been objectively unreasonable because it ignored DaPrato's FMLA application and medical records and was grounded in "shock, outrage and offense" at the possibility of further FMLA leave rather than "reasonable discovery and evaluation of the facts."

DaPrato v. Massachusetts Water Resources Authority

THE ISSUE: Can an employer consider an employee's conduct on vacation when evaluating whether to terminate or otherwise sanction that employee for abuse of medical leave?

DECISION: Yes, but the conduct must be inconsistent with the employee's claimed reasons for that medical leave (Supreme Judicial Court)

LAWYERS: Robert S. Mantell of Powers, Jodoin, Margolis & Mantell, Boston; David E. Belfort and Michael L. Mason, of Bennett & Belfort, East Cambridge; Andrew McIlvaine of Cambridge (plaintiff/appellee)

Carolyn Francisco Murphy, Meghan L. McNamara, Bonnie M. Gillespie and John S. Chinian, of the Massachusetts Water Resources Authority, Charlestown; James F. Kavanaugh Jr. and Michael J. Rossi, of Conn, Kavanaugh, Rosenthal, Peisch & Ford, Boston (defendant/appellant)

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