



## LABOR & EMPLOYMENT

# LAW ADVISER

VOLUME 3 | ISSUE 1

WINTER 2011

## Recent Class-Action Lawsuits Aimed at Employment Practices: RNs Are Targeting Medical Facilities

By Howard G. Estock

There has been a recent surge in class-action suits involving employment matters. Early in 2010, reports of a number of similar class-action suits surfaced. These suits alleged violations of overtime payments required under the federal Fair Labor Standards Acts ("FLSA") and state wage and hour laws. Many of the reported cases involved registered nurses ("RNs") in metropolitan medical centers. A number of such suits were brought in the Greater New York City area and upstate New York as well as in West Coast medical centers.

Now it appears that the attention of the class-action bar has turned to the practice of employers to share wage information with other employers in their industry. Numerous class actions have been brought alleging violations of the Sherman Antitrust Act. While the Sherman Antitrust Act applies to all sectors of private industry, surprisingly the spate of recent antitrust actions all concern claims by RNs against their employers and one or more "co-conspirator" medical centers. The allegations are that the employers and co-conspirators share wage and other information among one another for purposes of conspiring to depress wages or other working conditions.

One of the most recent of the antitrust cases involves the Albany Medical Center which just settled an RN-class-action suit for \$4.5 million. There are similar cases pending in Michigan, Texas, and Arizona.

There are national plaintiffs' class-action law firms affiliated with both the overtime class-action cases as well as the antitrust class actions. Several of the suits involve the same plaintiffs' class-action law firms. The concentration upon medical centers and RNs indicates that these FLSA and Sherman Act lawsuits are not random occurrences.

The "name of the game" in such lawsuits is for the plaintiffs to obtain class certification from the court, which in turn guarantees that the defendants will likely spend millions just in defense costs. This frequently leads to early settlements of the cases and large fees for the class-action law firms.

The Sherman Antitrust suits noted above each allege that the defendant-hospitals conspired to depress the RNs' wages by, among other things, **sharing wage information among employers**. The direct sharing of wage information among facilities is almost always a violation of Title 1 of the Sherman Act. It is possible to obtain comparative information regarding wage ranges by use of industry service groups which can legally gather such information and then publish it by geographic area rather than by name of each institution. The Northern Metropolitan Hospital Association is but one example of such an industry group.

The State and federal wage and hour laws are likewise a fertile ground for class-action attorneys. The remedies for FLSA violations, depending upon the state in which the suit is brought, include attorneys' fees, punitive damages, and up to six years of back wages under generous statutes of limitations.

**CHECK LIST, Item #1:** If you are seeking wage information from other employers, you should check immediately with counsel before you proceed and review the potential antitrust implications.

**CHECK LIST, Item #2:** If your payroll practices, such as rounding, docking, "casual overtime," "comp-time," clean-up time, donning/doffing, and allowing employees to work for affiliated organizations within the same work week, have not been vetted by legal counsel recently, **now** may be a good time to seek a professional's review.

These concerns may be especially critical for health care facilities employing RNs, in light of the recent class-action activity in such facilities across the country.

# FMLA Rights v. Operational Needs – How Employers Can Win

By Arthur J. Robb

How does an employer balance an employee's FMLA rights with the legitimate operational needs of the company? This question arises in many scenarios. But one of the tougher cases is when the employer decides to take an adverse action while the employee is out on an approved leave.

Consider the following facts taken from a recently-decided federal court action, *Terry v. Real Talent, Inc.* An employer's bookkeeper requests and receives approval for a two-to-three-month leave for the birth of her child. While the bookkeeper is out on leave, the employer's accountant reviews the company books and records. The accountant reports to the employer that the books are a disaster—accounts are not reconciled, invoices are not recorded or paid and so forth. So, the employer calls the bookkeeper and terminates her employment, approximately two weeks into her approved childbirth leave. The bookkeeper sues and the employer seeks dismissal of the lawsuit. The court refuses to dismiss the case, finding that the bookkeeper's alleged performance deficiencies alone do not absolve the employer of potential liability.

Why?

The FMLA contains two basic restrictions on an employer's ability to terminate. First, an employer may not retaliate against an employee for exercising his or her FMLA rights. Second, an employer may not interfere with an employee's exercise of FMLA rights. Thus, an employer may not act with retaliatory animus—which most employers would readily understand. But additionally, if the employer's action cuts short an approved leave, then the employer may be subject to liability regardless of its motives. In other words, FMLA "interference" is akin to a strict liability offense.

So may an employer ever terminate while an employee is out on an approved leave? What if the employer discovers the employee's gross misconduct? What if dire financial circumstances require staff reductions? What if the employer had already decided to terminate before the employee's leave commenced? How does the employer ever act without "interfering" with the employee's FMLA rights?

Once an employee shows her FMLA leave was interrupted, the employer may avoid liability only by showing that it would have taken the same action had the employee not been out on leave. This standard places the burden of proof on the employer.

In the *Terry* case, the employer simply could not convince the court that it would have terminated the bookkeeper had she not been out on leave. The employer's proof failed in several ways:

- There were facts showing that the employer may have been aware of the state of its finances before the employee's leave began, undercutting its claim that it only discovered the issue afterward.
- The employer never previously disciplined the bookkeeper because of her performance.
- The employer never told the bookkeeper that she was being terminated for poor performance; to the contrary, the employer's e-mail communications could have been read as giving inconsistent reasons related to payroll reduction.
- The employer made an ambiguous comment about the bookkeeper being a "liability" which could have been interpreted as referring to her pregnancy and FMLA leave.

Simply stated, the employer in *Terry* fell victim to its own poor documentation and ill-advised communications.

Employers can (and should) take those actions that would have been taken had the employee not been out on FMLA leave. But they must be prepared to prove it. The nature of the proof will vary with the circumstances. As always, a thorough investigation is recommended before taking any adverse action. The investigation should focus on the following:

- Is this a decision that was made before or after the leave began?
- If after, why is the decision contemplated at this time?
- Is there a change of circumstances or newly discovered information that supports the timing of the decision?
- Is the decision consistent with the treatment of other employees not out on FMLA leave?

If the investigation supports it, then the employer should implement the contemplated action. The failure to do so could make it difficult to take action at a later date, or in other similar cases. If you have questions about how to treat an employee on FMLA leave, consult legal counsel.



## Think Again—The ADA May Protect an Employee’s Inability to Think

By Laura D. Scully

In a recent unpublished decision, *Richard v. DuPont Company*, the Fifth Circuit Court of Appeals affirmed dismissal of a discrimination claim brought against an employer under the Americans with Disabilities Act (“ADA”) on the basis that the plaintiff was unable to think. Plaintiff Keri Richard, a full-time administrative assistant, alleged that she was cognitively limited due to depression and anxiety, which were exacerbated when her employer, DuPont, did not reasonably accommodate her. The Fifth Circuit rejected Richard’s claim that she was substantially limited in the major life activity of thinking. The Court pointed to the facts that she was able to tend to her basic, daily personal responsibilities, and that her own treating physicians neither considered her depression or anxiety to be disabling, nor recommended that she request accommodations from DuPont.

Significantly, thinking is considered a “major life activity,” along with several other major life activities that are cognitive in nature. These recently classified activities are perhaps less than intuitive and include, among other things, learning, concentrating, and communicating. At least with respect to thinking, this categorization is in keeping with judicial developments within the past decade; many federal Courts of Appeals have already recognized thinking as a major life activity in and of itself. Plaintiffs who have instituted discrimination claims based on an inability to think have done so, for example, where they have allegedly suffered from depression, anxiety, attention deficit disorders, and chronic fatigue syndrome. However, mere diagnosis of a mental illness is not determinative of whether an employee is disabled within the meaning of the ADA. Assessing the relative severity and nature of the illness’s effects is critical.

In the case of an employee unable to think, making employment decisions can be especially tricky, given that the attendant illness is intangible and unfortunately, though often, stigmatized, despite developments in mental health services and awareness. At least concerning the ADA, however, employers should start thinking about employees who cannot think, as the failure to address mental limitations appropriately can have material consequences.



## Jury Awards Damages to Former Teacher With Seasonal Affective Disorder

By **Stefanie R. Munsky**

A Wisconsin school district was recently found liable for failing to offer a reasonable accommodation to a former teacher in violation of the Americans with Disabilities Act (“ADA”). In *Ekstrand v. School District of Somerset*, the school district reassigned the plaintiff, who had been teaching for five years, to a classroom without an exterior window. Based on her diagnosis of seasonal affective disorder, a type of depression, the plaintiff made numerous requests to the school district for an alternate room with natural light. The Seventh Circuit overturned the district court’s grant of summary judgment as to the failure to accommodate claim, leaving this issue to be decided by a federal jury. After a trial on the claim, the jury awarded the plaintiff in excess of two million dollars for the school district’s refusal to provide the plaintiff with a classroom with natural light.

This jury award highlights the significance of the interactive process and an employer’s obligation to engage in interactive communication to determine a reasonable accommodation under federal, state and local law.

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