

A Leave Law Mess and the Trial Thereof: How HR and In-House Counsel Can Make the Difference

Presented By:

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Meet Greg Jones

- Truck driver for Acme Delivery Company
- Army Veteran (by the skin of his teeth)
- Poorly performing employee



"A Leave Law Mess"

Scene 1:

Greg Jones and his co-worker
in the Acme break room talking.

USERRA

Who is Covered

- USERRA applies to persons who perform duty, voluntarily or involuntarily, in the "uniformed services," which includes the Army, Navy, Marine Corps, Air Force, Coast Guard, National Guard, Public Health Service Corps, and the Reserves
- Uniformed service includes active duty, active and inactive duty training, and funeral honors duty
- USERRA covers nearly all employees, including part-time and probationary employees. USERRA applies to virtually all U.S. employers, regardless of size

USERRA

Basic Provisions/Requirements

- USERRA prohibits employment discrimination against a person on the basis of past military service, current military obligations, or intent to serve
- An employer must not deny employment, reemployment, promotion, or any benefit of employment to a person on the basis of a past, present, or future service obligation
- Employers must reemploy servicemembers returning from service if five criteria are met:
 1. The person was absent from a civilian job
 2. The person gave advanced notice (to the extent possible)
 3. The person's service did not exceed five years
 4. The person was honorably discharged
 5. The person reported back in a timely fashion

USERRA

Employee Rights

- **Reemployment**: Employers must reemploy returning servicemembers in the job that they would have attained had they not been absent for military service with the same seniority, status, pay and benefits
 - If the servicemember does not qualify to return to their previous job, he or she must be reemployed in a position closest to their former position (if qualified)
- **Cause Termination**: USERRA also imposes a cause termination standard. A reemployed employee may not be discharged without cause for one year after the date of reemployment if the person served for more than 181 days; and six months after the date of reemployment if the person served 31 to 180 days

USERRA

In Greg's Case...

- Covered Servicemember?
- Protected even though he goofed around while overseas?
- Does the cause standard apply?

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Scene 2:

Mike Smith, Greg's supervisor, and Linda Williams, Acme HR Manager, in Linda's office discussing Greg.

FMLA & Washington Family Leave Act

Employee Eligibility

- Employed for at least 12 months (need not be consecutive)
 - An employee who leaves employment due to military service and returns must be given credit for the period of military service towards the 12 months of employment eligibility requirement
- Employed for at least 1,250 hours during 12-month period immediately preceding commencement of leave
 - An employee returning from military service must be given credit for the hours he/she would have worked but for the military service when determining whether the employee meets the 1,250 hours eligibility requirement
- Works at a work site where 50 or more employees are employed within a 75-mile radius

FMLA & Washington Family Leave Act

Types of Leave

- (1) "new child"
- (2) to care for employee's parent, spouse or child with a serious health condition
- (3) because of a serious health condition that makes the employee unable to perform at least one essential function of his or her job

Also, under FMLA:

- (4) to care for family member in the military
- (5) for a qualifying exigency related to the deployment of a family member in the military

FMLA & Washington Family Leave Act

Serious Health Condition

- Condition that involves or involved inpatient care
- Period of incapacity for more than three days plus "continuing treatment"
- Pregnancy-related incapacity and medical appointments
- Certain chronic conditions, permanent or long-term conditions, and conditions requiring multiple treatments
- Overlap with "disability" under WLAD and ADA (broader definition after ADAAA)

FMLA & Washington Family Leave Act

Amount of Leave

- 12 workweeks during any "leave year"
- Employer must choose from among four "leave year" options:
 - (1) Calendar Year
 - (2) Any fixed year (Example: June 1-May 31)
 - (3) 12-month period measured forward from first FMLA leave
 - (4) rolling 12-month period measured backward from commencement of any leave
- Note: In Washington, when a woman gives birth to a child, she is entitled to 12 weeks of leave under the Washington Family Leave Act *in addition to* any pregnancy disability leave taken under RCW 49.60 and WAC 162-30

FMLA & Washington Family Leave Act

Leave Year

- Failure to select "leave year" option results in employee being entitled to most beneficial option
- The employer may subsequently select a leave year only by providing at least 60-days notice to all employees of the option the employer intends to implement. During the 60-day period, the leave year providing the most beneficial outcome to the employee must be used
- 29 CFR § 825.200 (e)

FMLA & Washington Family Leave Act

Intermittent and Reduced Schedule Leave

- Must be permitted if medically necessary due to employee's or qualifying family member's serious health condition
- Special FLSA and WMWA exemptions allow deducting less than a full day's pay for exempt employees
- Amount of leave used for intermittent or reduced schedule leave is determined on pro rata basis

FMLA & Washington Family Leave Act

Use of Paid Leave During FMLA Leave

- Employer may always require employee to substitute accrued paid vacation leave for unpaid FMLA leave (if notice is provided)
- Employer may require substitution of sick leave when FMLA leave is taken on account of employee's serious health condition
- Other forced substitution of accrued sick leave depends on company policies concerning use of sick leave for reasons other than employee's illness
- When employer has right to force substitution, employee has corresponding right to elect substitution
- Substitution rules do not apply when FMLA leave is paid (e.g., time loss, long-term disability benefits)

FMLA & Washington Family Leave Act

Benefits

- Employee entitled to health plan coverage during FMLA leave
- Employee can be required to make contributions he or she would have been required to make had leave not been taken
- Employer may be entitled to recover premiums paid if employee does not return to work after leave only in limited situations
- Upon return from leave, employee is entitled to be restored to exact same level of benefits he or she had when leave began

FMLA & Washington Family Leave Act

Employer Required Notice Before Leave Request

- FMLA posters must be displayed in conspicuous places
- If employer publishes employee manual or information on benefits, it must include an explanation of FMLA rights (at a minimum everything contained in the DOL's general notice)
- If employer does not publish manual or benefits information, it must provide the FMLA general notice to each new employee upon hiring
- Distribution may be accomplished electronically

FMLA & Washington Family Leave Act

Employer Required Notices After Leave Request

- Eligibility Notice
 - Give within 5 days of receiving notice of need for leave
 - Advise employee on certification, use of paid leave, benefits, key employee status
 - If not eligible, give at least one reason
- Rights and Responsibilities Notice
 - Advise employee on whether substituting paid for unpaid leave is required, whether certification is required, how payment of premiums for health care will be handled
 - Include all forms employee needs to fill out and submit
- See DOL's combined Eligibility Notice of Rights and Responsibilities, WH-381

FMLA & Washington Family Leave Act

Employer Required Notices After Leave Request - Continued

- Designation Notice
 - Informs employee in writing whether leave qualifies as FMLA
 - Give within 5 days after employer has enough information to determine whether employee qualifies for leave
 - Advise employee about substitution of paid leave requirements
 - Inform employee of any fitness-for-duty requirements and attach essential job functions

FMLA & Washington Family Leave Act

Employee Required Notice

- Must provide 30-days notice of leave of foreseeable leave, or as soon as practicable
- Verbal notice that employee might need leave for FMLA-qualifying reason is sufficient
- It is employer's responsibility to determine if employee is entitled to FMLA leave and to request further information needed to make determination
- Employer may impose additional notice requirements but they may not deny or delay FMLA leave for failure to comply

FMLA & Washington Family Leave Act

FMLA Prohibitions

Employer cannot:

- Interfere with, restrain or deny FMLA rights
- Discharge or discriminate against employee based on use or future use of FMLA leave
- Discourage employee from taking FMLA leave
- Count FMLA leave as an "occurrence" under an attendance policy

FMLA & Washington Family Leave Act

Liability

- Individuals who make decisions about leave can be held personally liable for FMLA violations
- No emotional distress damages available under FMLA (but are available under ADA and WLAD disability discrimination claims)

Exhibit 1: Therapist's Letter

New Earth Meditations Holistic Therapy
and Massage Center

1234 Main Street, Suite 300
Seattle, WA 98101



November 1, 2011

TO WHOM IT MAY CONCERN:

Greg Jones suffers from Post Traumatic Stress Disorder as a result of his service in the Gulf War. His condition will require that he miss work periodically to obtain treatment.



Sheila Psophthart
Therapist and Cranial Sacral
Therapy Masseuse

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Scene 3:

Mike and the dispatcher in the dispatch room calling Greg on his day off for an emergency dispatch.

ADA & Accommodations

- The Americans with Disabilities Act ("ADA") requires an employer to provide a reasonable accommodation to qualified employees or applicants, unless to do so would cause undue hardship
- Three categories of reasonable accommodations:
 - i. Job application process;
 - ii. Work environment; or
 - iii. Equal benefits and privileges of employment.
- Must be provided to qualified part-time, full-time, or probationary employees
- Generally, the individual with a disability must inform the employer that an accommodation is needed

Employee Misconduct and the ADA

Gambini v. Total Renal Care, Inc.

- Under *Gambini*, when employers are dealing with unacceptable conduct of an employee with a known disabling condition, they'll need to consider whether the misconduct is "part of" the disability
- "Where an employee demonstrates a causal link between the disability-produced conduct and the termination, a jury must be instructed that it may find that the employee was terminated on the impermissible basis of her disability"
- Defense: Undue hardship, business necessity, direct threat

Employee Misconduct and the ADA

In Greg's Case...

- Disabled? Washington Law v. ADA
- Disability v. Misconduct?
- Duty to Accommodate?

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Scene 4:

Mike and Linda in Linda's office discussing whether Greg's employment should be terminated.

Termination Risk Assessment

Legal Issues

1. Are we taking an adverse action?
 - a. Yes. Termination qualifies as an adverse action
 - b. Other types: Demotion, suspension without pay, pay decrease, denial of benefits, denial of promotion, refusal to hire
 - c. May or may not be: Written discipline

2. Is the employee in a protected category?
 - a. Yes. Disabled, veteran male

3. Has the employee engaged in protected activity?
 - a. Yes. Military leave; FMLA leave; WFCA

Termination Risk Assessment

Practical Issues

1. Is the employee the type to sue or run off to a lawyer?
 - a. Yes!
 - i. He's already told us as much
 - ii. Letter from the therapist

2. Is the employee motivated to sue?
 - a. Yes!
 - i. He believes he was treated unfairly
 - ii. He's angry
 - iii. He's opportunistic

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Scene 5:

Mike, Linda and Greg in Linda's office for the termination meeting.

Termination Risk Assessment

How Was the Termination Handled?

1. The Good
 - a. Two people attended
 - b. Linda has her reasons down
 - c. Linda cuts off the debate

2. The Not So Good
 - a. Mike debates Greg
 - i. Debating is always a mistake!
 - ii. What happens here?
Mike defends his decision and injects new issues
 - b. Didn't hear Greg's side until after the decision was communicated
 - c. No separation agreement ready

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Scene 6:

Linda and Acme's outside attorney, Julia Perkins, in Linda's office discussing the charges filed by Greg.

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Scene 7:

Linda on the witness stand at trial being examined by Julia and cross-examined by Greg's attorney, Dan Donogood.

Employer's Counsel Direct Examination Goals

- Tell the employer's side of the story
- Convince the jury that the employer's decision was fair
- Explain the reasons that termination was necessary (how the workplace, co-workers and the business would be impacted if the employee's conduct was permitted)
- Have HR provide personal background so she comes across as competent and sympathetic to jurors
- Get the bad facts about the plaintiff and the good facts for the employer before the jury
- Address facts that are bad for the employer before the jury hears about them on cross examination
- Get facts important to employer's legal defense in the record for a potential JNOV and/or appeal (even if they aren't important to the jury)
- Introduce any key documents into evidence

Plaintiff's Counsel

Cross Examination Goals

- Shine a spotlight on the mistakes
 - FMLA notice
 - Mike's comment about missing time
- Hit themes
 - Rush to judgment
 - The punishment did not fit the crime
 - Greg was singled out