



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

Interpreting and administering leave laws is one of the trickiest areas that employers expect their HR and employment law professionals to master—but even the best efforts can't always prevent a lawsuit. In this session, leave law experts and veteran trial lawyers will work through a worst case scenario and show where and how HR and in-house expertise can make the difference, both in the compliance phase and at trial.

(This is a 90 minute presentation.)

Session Presenters:

James Sanders is a Seattle trial attorney who focuses on employment law. James's practice covers all types of legal disputes that arise between employees and employers, including employment discrimination, trade secrets, noncompetition, employee raiding, wage and hour and employment class actions. An experienced first-chair trial attorney, James avoids "checklist" litigation strategies and instead looks for particular and cost effective solutions to each dispute. If that doesn't work, he litigates for his clients with a fair but aggressive style that consistently produces winning results. James also has an active counseling practice, especially in the high-technology sector, having assisted clients such as Microsoft, AT&T Mobility, Cardiac Science, Corixa, T-Mobile, Qwest, aQuantive, and Boeing with executive negotiations, employee IP disputes and other complex employment issues. James studied Rhetoric at Berkeley before attending law school at the University of Chicago, where he was the Hinton Moot Court co-champ and a member of the Law Review.

Julie Lucht, a Perkins Coie partner in the firm's Labor & Employment practice, focuses on employment litigation and counseling. She represents clients in all phases of litigation in defense of numerous types of employment discrimination and other employment-related claims. She represents clients in special remedies litigation instigated to protect clients from trade secret misappropriation, corporate raiding, breach of contract and fiduciary duties and other employment-related offenses. She counsels clients in arbitration, mediation and other alternative dispute resolution proceedings and defends clients in class action litigation and in lawsuits litigated by the EEOC.



Jones v. Acme Delivery Company

Scene 1: Greg Jones Returns from Iraq

Greg Jones was a truck driver for Acme Delivery Company and an Army Reservist. He had been working for Acme for five years when he was called up to active duty and deployed to Iraq. Fortunately for him, the US drawdown began soon after he arrived and he was only deployed for 32 days. Greg returned to work for Acme right after his deployment.

For the first few weeks back at work, Greg talked to his coworkers about how the deployment was a waste of time and how he spent most of the time in Iraq playing cards and doing Crossfit workouts. He also bragged about how he spent a few days hanging out in Germany on his way back to the U.S.

A month or so after his return, Greg started to have performance problems. He was often late or missed work altogether. Ultimately, Greg presented Acme with a note from a therapist stating that Greg needed intermittent leave to cope with Post Traumatic Stress Disorder (“PTSD”) from his deployment. The therapist did not suggest or request any other accommodations. Within six months after presenting Acme with the therapist’s note, Greg had used more than 480 hours of leave that Acme had coded as FMLA.



Scene 2: Greg Refuses a Dispatch and Blows Up at the Dispatcher

Greg typically worked Monday through Thursday. One Friday Jerry the dispatcher called Greg in the morning and informed him that Acme needed him to cover an emergency dispatch. Greg refused the dispatch and yelled at Jerry and his manager, Mike Smith. Greg also criticized Mike's management practices and Acme's customer practices, just before angrily hanging up. This was about five months after Greg returned from his Iraq deployment and it was a week after Greg passed 480 hours of absences coded as FMLA leave.



Scene 3: Management and HR Meet and Decide to Terminate Greg

Before firing Greg, Acme's Human Resources Manager Linda Williams, met with Greg's manager Mike to discuss whether termination might be appropriate. Mike explained the situation, and complained about Greg's insubordination and his rude comments about Mike's management practices and the company's customer practices.

Linda pulled Greg's HR file and realized that Greg had been taking intermittent FMLA leave. She noted that Greg had taken a combined total of 12 1/2 weeks of intermittent leave in the last 12 months (but only 3 weeks for the calendar year).

Linda noted to Mike that the Company used a rolling 12-month calendar to calculate leave exhaustion. But she noted out loud to herself that she could not recall if anyone had ever told Greg that the Company used a rolling 12-month period as opposed to a calendar system. She decided that this didn't really bother her all that much and that Greg had "clearly" exhausted his leave.

Linda also noticed that there was a two-week period that HR had designated as FMLA leave during which Greg was apparently visiting his sick parents in Florida. The HR assistant Betty had noted that Greg had asked to take vacation during that period but that since Greg had mentioned that he was actually visiting his sick parents, she assumed it was FMLA leave. Linda remarked that Betty was very reliable and that if Betty thought the leave was FMLA leave, she must have been right! She could not find a note in Greg's HR file, however, advising Greg that the time would be treated as FMLA leave. This bothered her but she decided it wasn't that big of a deal.

Turning to the blow up with dispatch, Linda asked Mike if he had noticed Greg engaging in this type of behavior before. As Mike began to think about it, he vaguely recalled that Greg was involved in a verbal altercation with a co-worker at some point before Greg



was deployed. Greg had used some inappropriate language when referring to a co-worker and Mike thought he might have threatened to run the co-worker over with his car (although he wondered if he was confusing this with another employee). Mike did not recall ever reporting it to HR, however, and Linda had no record of the incident in Greg's HR file. The more Mike began to think of it, Greg had always been a little "off." Many people were uncomfortable working with him. His behavior was unpredictable and he had made angry comments before. Mike didn't feel entirely safe around Greg. He also recalled Greg mentioning at one point (before his deployment), that he was going to counseling and taking "anger management" classes.

Linda wondered whether they needed to give Greg a warning and a chance to improve his behavior. But given that Mike didn't entirely feel safe around Greg, Greg's behavior had been a bit erratic in the past, and he had exhausted his leave, Linda and Mike agreed that it would be best to terminate Greg. Linda thought about calling Acme's employment counsel but decided against it since she felt the decision was so clear-cut.



Scene 4: Mike and Linda Deliver the News to Greg

Mike and Linda scheduled a meeting the next day with Greg to deliver the news. Greg did not take the news well. He responded angrily and demanded to know why he was being fired. Linda told Greg he was being fired for insubordination and uncivil behavior towards the dispatcher. Greg argued that Jerry the dispatcher knew he had plans with his children that day and it was unfair that he was called when others were available. Mike told Greg that there was more to it than just the conflict with dispatch. Mike reminded Greg that Greg had had conflicts with other employees, too, plus he'd been missing a lot of time lately. Linda told Greg she was not going to debate the issue and that the decision was final. Greg stood up, told them they'd be hearing from his lawyer and stormed out of the room.



Scene 5: Linda Meets with Employment Counsel Julia Perkins

After Acme received the Charges from the EEOC and Department of Labor, Linda decided it was time to meet with the Company's employment counsel, Julia Perkins.

Linda explained to Julia that Greg's behavior had been erratic and insubordinate. She recounted Mike's story about Greg threatening to run a co-worker over with his car. She also noted that the incident leading to his termination occurred about five or six months after Greg had returned from deployment. She complained that she couldn't see how Greg might possibly think he was entitled to more leave when he had taken 12 ½ weeks of intermittent leave in the last 12 months.

Julia discussed the way the Company had calculated Greg's leave. She asked whether Acme had a provision in its handbook or policies informing employees of the system the Company used to calculate leave (rolling versus calendar year). Linda responded that it did not. She also noted that there was no explanation provided to Greg by letter or verbally about how his leave would be calculated. While they were on the subject, Linda also expressed her concern about the two weeks that Betty had assumed should be designated as FMLA leave.

Julia asked if Acme had a code of conduct or guidelines outlining the types of employee conduct that could result in discipline. Linda responded that it did not. Linda noted that they had certainly terminated employees in the past for insubordination and refusing a dispatch, but there had been some inconsistency. The Company had been more lenient with some employees in the past.

Julia also asked whether Acme had terminated any other employees after they returned from deployment or leave. Linda could not remember any other time, but she told Julia she would need to confirm.



Julia asked about Greg's previous erratic behavior and whether HR had ever met with Greg to discuss any potential accommodations. Linda responded that, other than granting his request for intermittent leave, HR had not discussed any potential accommodations with Greg.

Julia also asked if Greg's claim that he suffered from PTSD from his deployment had ever been substantiated. Linda responded that, other than the note he presented from his therapist, HR had not discussed the issue with him. She noted that it all seemed a little weird since he was deployed for only 32 days and he complained about having nothing to do during his deployment. Julia agreed that this seemed odd but probably would not change the Company's responsibility to accommodate any disability he might have (although it was not clear he actually had one).

Julia also asked if there was any documentation concerning the alleged threat to run over a co-worker. Linda responded that there was not and, in fact, Mike, Greg's manager, was the only one who recalled the incident. The co-worker Greg had allegedly threatened was no longer with the company and, the last she heard, he had move to Tijuana and could not be found.

Julia noted that there were definitely some issues here and that this was not as clear-cut of a case as Linda thought it was.

Shortly after that, Greg retained an attorney and filed a complaint in federal court. The case did not settle and proceeded to trial after the judge denied Acme's motion for summary judgment.