Use 'Honest Suspicion' Defense With Caution

Law360, New York (November 13, 2008) -- When asked recently about the discovery that over 90 percent of Long Island Rail Road retirees are receiving disability insurance payments, New York Senator Charles E. Schumer replied, “We all know something is rotten in Denmark.”

Senator Schumer was not alone – many were shocked by The New York Times report that in one year, 97 percent of LIRR retirees applied for, and received, disability benefits. To add insult to injury, the Times located some of these disabled retirees, each of whom was certified as disabled by a doctor, playing golf in state parks.

The question for employers faced with an employee who is on a disability leave of absence pursuant to certification from a healthcare provider, but whom they have reason to suspect is not using the leave for its intended purpose, is what is to be done?

Under the Family and Medical Leave Act (“FMLA”), the employer must proceed with caution, balancing its concerns with costs, productivity, fairness and morale against the employee’s right to take leave without interference or retaliation, as well as his or her privacy rights.

An employer that determines an employee is abusing disability leave, and elects to terminate the employee while the employee is on leave, risks a claim of having interfered with the employee’s FMLA rights.

To defend against such claims, employers have invoked the defense that they had an “honest suspicion” that the employee was not using the leave for its intended purpose.

In Vail v. Raybestos, the Seventh Circuit recently provided support for the “honest suspicion” defense, affirming summary judgment in favor of the employer that a termination based on the “honest suspicion” that the employee was abusing her leave did not interfere with the plaintiff-employee’s FMLA rights.

In this article, we examine Vail v. Raybestos and its implications, with a note of caution regarding the possible limits to the “honest suspicion” defense.

The FMLA

The FMLA entitles eligible employees to up to 12 weeks of unpaid leave for, among other reasons, a serious health condition or to care for a family member with a serious health condition.[1]
Employees are not entitled to be placed in a better position than if they had not taken leave, but at the end of the 12-week period they generally are entitled to be returned to their job.

Among the limited reasons for which employees may be denied reinstatement are: (1) obtaining leave by fraud; or (2) violating a uniformly-applied policy governing outside employment, which continues to apply during FMLA leave.[2]

Regulations promulgated by the Department of Labor (the “Regulations”) set forth a procedure for employers to follow if they question the adequacy of a medical certification.[3]

If the employer receives a complete, signed certification, it may not request additional information, but may have another healthcare provider contact the employee’s healthcare provider on its behalf for “clarification and authenticity.”[4]

If there is reason to doubt the validity of the certification, the employer may request a second opinion by an independent healthcare provider and if there is a conflict between the two, certification may be sought from a third, jointly-approved provider whose opinion is final.[5]

The Honest Suspicion Defense

In Vail v. Raybestos, plaintiff Diana Vail suffered from migraine headaches for which she was approved to take intermittent FMLA leave. Due to the nature of her condition, Ms. Vail frequently reported her absences immediately prior to the start of her shift.

Her supervisors, however, began to notice a pattern; her absences were more frequent during the workweek and in the summer and fall, coincidentally, when her family lawn-mowing business was particularly busy.

In fact, from May through September 2005, she received more than 33 days of approved leave.

When Raybestos became suspicious of Ms. Vail’s absences, it hired an off-duty police sergeant to monitor her the next time she requested leave.

On Oct. 6, 2005, Ms. Vail called to report that she would not be coming to work on the instruction of her doctor, who had changed her medication and directed her not to work for the next 24 hours.

The following morning, off-duty Sergeant Largent observed Ms. Vail leave her house, fill up two lawn mowers with gasoline and mow the lawn at a cemetery, all of which he reported to Raybestos.

Later that day, Ms. Vail called in to report that she required medical leave for October 7 due to another migraine. Her physician had already provided a medical note to Raybestos prior to Ms. Vail’s call.

Based on all of these circumstances, Raybestos concluded that Ms. Vail was abusing her leave. In addition, it appeared that she violated a collective bargaining agreement provision prohibiting working for profit while on leave.
Accordingly, the next time she reported to work, Raybestos terminated Ms. Vail’s employment. Ms. Vail filed suit alleging that Raybestos violated the collective bargaining agreement and interfered with her rights under the FMLA.

In affirming the District Court’s rejection of Ms. Vail’s argument that Raybestos interfered with her FMLA rights, the Seventh Circuit explained that to prevail, Ms. Vail had to demonstrate that she is an eligible employee who took leave for its intended purpose and that Raybestos denied her a benefit as a result of taking that leave.

One way for Raybestos to defeat that claim, therefore, was to show that she did not take FMLA for its intended purpose.

Under Seventh Circuit precedent, the Court held, Raybestos did so by establishing that it refused to reinstate Ms. Vail due to its honest suspicion that she was abusing her leave.

Already suspicious due to the pattern of Ms. Vail’s absences given her role in the family business, Raybestos received further confirmation from Sergeant Largent’s investigation, which revealed that Ms. Vail was mowing a lawn after reporting that she required leave due to the onset of a migraine.

*The Limits Of Honest Suspicion*

Although other courts have recently granted summary judgment to employers based upon the “honest suspicion” theory,[6] it has its limits. For example, in Weimer v. Honda of America Mfg. Inc., No. 2:06-CV-844, 2008 WL 2421648 (S.D. Ohio, June 12, 2008), the court denied summary judgment to an employer that had terminated an employee on the grounds that he allegedly misused his FMLA leave.

In Weimer, plaintiff, James Weimer was injured at work, transported directly to receive medical treatment, and was required to see a specialist before he could receive clearance to return to work. Mr. Weimer returned to work immediately upon being cleared by the specialist.

However, during Mr. Weimer’s FMLA leave, defendant received information that Mr. Weimer was building a porch on his home and obtained a “surveillance” video of him carrying and installing planks of wood and using a drill.

When questioned about these activities upon his return to work, Mr. Weimer admitted to them, but claimed that he believed he was prohibited from returning to work until he received medical clearance.

In a decision instructive to both plaintiffs and defendants, the Weimer court denied summary judgment to both sides due to the issues of fact and credibility questions that had to be determined by a jury, including whether, as Mr. Weimer contended, he never wanted to take leave, but was ordered off work and prevented from returning until he was cleared by a specialist, or whether he was an opportunistic schemer quite capable of working and who failed to mention to his physicians that he was adding a porch onto his home.

Moreover, the parties failed to submit sufficient evidence for the court to determine the essential functions of Mr. Weimer’s job. It may have been that Mr. Weimer was capable of performing certain tasks related to the porch, but not able to perform his job.

Finally, the court held that there was a factual dispute as to whether defendant honestly believed that Mr. Weimer exceeded the scope of his leave.
If defendant was aware that Mr. Weimer could not perform his job, despite his ability to perform the tasks related to the porch, the investigation may have been a pretext for unlawful discharge in violation of the FMLA.

Similarly, in Nelson v. Oshkosh Truck Corp., No. 07-C-509, 2008 WL 4379557 (E.D. Wis. Sept. 23, 2008), the court denied summary judgment to an employer that terminated an employee it believed had misrepresented her medical status in her leave request and engaged in physical activity during her leave that was inconsistent with her claim that she could not work.

Plaintiff, Caroline Nelson requested a three-week leave of absence and submitted a medical certification from her doctor, delivering documentation to the defendant’s claims manager, Harold Hanson, in person.

Mr. Hanson became suspicious because Ms. Nelson did fax the certification or have a friend deliver it, as is typical when someone is sick, and because she appeared to be dressed to go somewhere.

Based on these suspicions, defendant engaged a firm to make a surveillance video of Ms. Nelson’s activities during her leave. Ms. Nelson was videotaped on several occasions during her leave driving around town, shopping, and running errands, among other activities.

In the interim, Ms. Nelson’s doctor provided a certification form indicating that Ms. Nelson would be unable to perform such functions as standing, sitting, walking, moving her arms, lifting, and speaking.

Given the discrepancies between the surveillance video and the paperwork, the company sought clarification from Ms. Nelson’s doctor. The doctor responded that due to Ms. Nelson’s mental illness and side effects of medication, she could perform all of the above activities at times, but unpredictably and only if she felt able.

She further explained that “[b]eing home allowed her to work through the side effects and start her recovery without endangering her co-workers.” When questioned regarding the videotape, Ms. Nelson admitted she was the person in the videotape, but said that she followed her doctor’s instruction by only engaging in such activities when she felt able.

Defendant nevertheless terminated Ms. Nelson and she brought suit, alleging interference with her FMLA rights.

Acknowledging that an employer need not prove fraud by an employee, but merely an honest suspicion that she has misused FMLA leave, the court nonetheless denied summary judgment to defendant because the clarification provided by Ms. Nelson and her doctor raised an issue of fact as to whether defendant had an honest belief as to whether she abused her leave or if it saw an opportunity to get rid of an employee with a chronic mental illness.

Practical Considerations And A Note Of Caution

Courts frequently point out that undercover surveillance of an employee is not the preferred method of handling personnel issues, yet, generally, admit the information gleaned from such methods.
Nevertheless, employers should use an abundance of caution when proceeding in this manner, and should first consult with counsel, check the laws of the jurisdiction in which any surveillance is to take place, and use a reputable investigative company or persons with law enforcement experience.

Moreover, carefully consider the basis of any suspicions. As the Nelson court noted, the “FMLA does not require an employer to ignore human nature and assume that each of its employees always tells the truth.”

On the other hand, if the source of the suspicion is itself questionable, employers should look before they leap to conclusions.

This is true when analyzing the findings of any investigation as well, since a court certainly will scrutinize them carefully. Remember, just because a person is able to shop for an hour or two at a time does not mean that they can stand on an assembly line for eight.

Although courts recognize that a flawed investigation can give rise to an “honest suspicion,” a lack of diligence in this area can also create the impression that the investigation was pretextual.

--By Howard S. Lavin (pictured) and Elizabeth E. DiMichele, Stroock & Stroock & Lavan LLP

Howard Lavin is a partner and Elizabeth DiMichele is special counsel with Stroock & Stroock & Lavan in the firm’s New York office.

[1] This leave may be taken concurrently with other forms of disability leave, such as workers’ compensation and short-term disability.
[2] 29 CFR § 825.312 (g) and (h).

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