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Failure to Follow Directions Dooms FMLA Claim Against Drexel

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Special to the Legal

"I didn't get the mail" or "I didn't read the materials provided" are almost always the legal equivalents of "the dog ate my homework." And just like the teacher who gave an "F" for the day, courts routinely reject these excuses in employment discrimination claims. This was most recently discussed in *Szostek v. Drexel University*, No. 12-2921, 2013 U.S. Dist. LEXIS 130328 (E.D. Pa. Sept. 11, 2013) (Tucker, J.).

FMLA VETERAN

Anthony Szostek was a long-term employee of Drexel University, who had worked his way up from the position of custodian to that of commercial driver. He was a member of Teamsters Local 115 and, as such, was subject to the collective bargaining agreement between Drexel and the union. Szostek had taken Family and Medical Leave Act intermittent leaves of absence numerous times during his career.

In November 2009, Szostek was diagnosed with depression and anxiety that prompted him to again request an intermittent leave under the FMLA. The Drexel FMLA form, filled out by Szostek, specifically noted that an eligible employee would receive a total of 12 weeks (60 days) of unpaid leave. Szostek's leave was approved and Drexel mailed to him the employer approval form, which, again, noted that he would be eligible for 60 days of leave. The approval form also stated that Drexel would require Szostek to recertify his medical condition after six months if he had not already exhausted his leave.

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NO MAILING ADDRESS

Szostek claimed, however, that he never got the approval form because he did not have a mailing address — that the one on file was invalid. Szostek ostensibly believed that his intermittent leave was viable for a full year.

In addition to his intermittent FMLA leave for depression, Szostek was injured at work and took six weeks of workers' compensation leave from mid-July 2010 to late August 2010. This leave counted against Szostek's available FMLA leave such that he had exhausted his available FMLA leave by September 7, 2010. As such, Drexel did not request that Szostek recertify his medical condition. The final moving part was that as of August 1, 2010, while Szostek was on his extended leave, Drexel instituted a new FMLA procedure when it outsourced the management of its FMLA program to a third-party administrator (TPA), The Hartford. This meant that an employee on FMLA leave was required to report his or her absence to both The Hartford and Drexel, although The Hartford was solely responsible for approving the requested leave.

Szostek again claimed that he did not receive written notice of the change in FMLA procedure, although the court noted that he did manage to provide a working mailing address in order to receive his workers' compensation checks.

FAILURE TO CALL FMLA ADMINISTRATOR

Szostek accumulated eight unapproved absences between September 7 (the end of his FMLA leave) and October 8, 2010. While he was not disciplined for these absences, he was subject to progressive discipline for five more unexcused absences between October

21 and November 3. Finally, on November 4, Szostek's supervisor advised him personally that his February to August FMLA leave had expired and that he should be calling The Hartford if he needed additional FMLA leave. Szostek called The Hartford on November 4 to report an absence, but failed to call the company when he was absent for four more days in November. In mid-December, after Szostek was back at work, The Hartford advised Drexel that other than the November 4 absence, the time Szostek missed between October 21 and November 30 had not been approved for FMLA (because he had not informed the TPA that the absences were to be for FMLA). Drexel then terminated Szostek for being absent without leave and for "proven dishonesty" in having told his supervisor that his absences in October and November had been approved for FMLA.

Szostek brought suit against Drexel for retaliation for having taken FMLA leave and for having interfered with his FMLA rights. The U.S. District Court for the Eastern District of Pennsylvania granted summary judgment to Drexel on all counts.

NO RETALIATION CLAIM

Initially, the court found that the approximately six-week gap between his request for FMLA leave on November 4 and the termination decision in mid-December was not "temporally proximate" to be unusually suggestive of retaliatory motive. Next, the court found that Drexel's decision-makers in December knew only that Szostek's absences in October and November (other than November 4) had not been approved for FMLA leave. As such, "there [was] no evidence that any of the Drexel employees who reviewed [Szostek's] absences [in December] had any information regarding his underlying request for FMLA leave." There was, therefore, no evidence of the causal connection necessary to state a prima facie case of retaliation.

There is a point where the employee must take responsibility for reading material given and following the direction provided.

Moreover, Szostek's assertion that he was not "dishonest" because he genuinely believed that his absences were FMLA-qualified did not establish pretext as a matter of law. The court noted that "there was no shortage of opportunities ... for [Szostek] to have been better informed about the amount of leave he had available." Not only could Szostek have provided a correct mailing address (meaning that he would have received the approval form stating that his leave was approved for six months before recertification was necessary), but the court observed that Szostek had taken FMLA leave on two prior occasions and, "therefore arguably should have been familiar with how Drexel's FMLA policy works." There was also evidence that Szostek had attended a meeting in October detailing the need to call The Hartford for all absences.

INTERFERENCE CLAIM REJECTED

Szostek's FMLA interference claim, based on his contention that the requirement to notify both The Hartford and Drexel was unduly onerous, was similarly dismissed. The court rejected Szostek's arguments that he had not been advised of the requirement to call the TPA with his absences. In doing so, the court detailed what Szostek knew or should have known and concluded that "it is difficult to understand how [Szostek] can now attempt to blame Drexel for his own unwillingness to follow the directions given to him."

Szostek's Americans with Disabilities Act and Pennsylvania Human Relations Act discrimination and retaliation claims were also rejected.

This case reminds of the old adage that "you can lead a horse to water, but you can't make him drink." There is a point where, after an employer puts reasonable processes in place, the employee must take responsibility for reading material given and following the direction provided. When the employee does not, and then attempts to blame the employer, it will inevitably be rejected as a "rationalization" — not evidence of pretext. As U.S. District Judge Petrese B. Tucker observed: "Rationalizations are not evidence" and will never defeat summary judgment. •