On Law

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Cummings•McClorey Davis & Acho, P.L.C.
Attorneys and Counselors At Law

Return to Work Issues Under the Family Medical Leave Act

Thomas J. Laginess

ISSUE: An employee has provided a Return to Work Authorization Form from their physician following approved leave pursuant to the Family and Medical Leave Act (FMLA). FMLA requires the employee to return to their original position.

QUESTION: Can the employer require the employee to take additional medical and/or work functionality tests before reinstating them to their original position?

GENERAL RULE: Employers may require an employee to obtain and present a Fitness-for-Duty Certification from the employee's health care provider stating the employee is able to resume work. The need for such certification is to be communicated to the employee at the time notice of eligibility for FMLA leave is given.

Additionally, the employer must have a uniformly-applied policy for all similarly-situated employees. As a general rule, the certification needs only to be a simple statement that the employee is able to return to work. If the employer has provided a detailed description of essential job functions, some federal appellate courts have allowed a thorough "functional capacity evaluation." The nature of the job, safety implications, and uniformity of policy for all similarly situated would be critical factors. For example, a knee injury may trigger the standards for an emergency medical technician, but not for an office clerk.

The employer may contact the employee's health care provider for purposes of authentication and for clarification after the employee has been given an opportunity to provide the requested information. HIPAA rules for privacy protection do apply.

CHECKLIST FOR FITNESS-FOR-DUTY CERTIFICATIONS

- ☑ Adopt a uniformly-applied policy or procedure requiring Fitness-for-Duty Certifications from all employees who take leave for a health condition, even if they do not take FMLA leave.
- ☑ Notify employees of the Fitness-for-Duty Certification policy in the employee handbook and again when an employee is notified that the leave requested qualifies for FMLA protection.
- ☑ Do not request Fitness-for-Duty Certifications from employees taking intermittent leave, unless there is a reasonable safety concern and then no more than once every 40 days.
- ☑ Be aware that state laws and/or a collective bargaining agreement may present special requirements regarding Fitness-for-Duty Certifications.
- ☑ Make certain that the Fitness-for-Duty Certification comes from the employee's own health care provider.
- ☑ Ensure that the Fitness-for-Duty Certification only relates to the particular health condition that caused the employee's need for FMLA leave.
- ☑ Do not delay the employee's reinstatement pending contract with their health care provider for purposes of clarification of a Fitness-for-Duty Certification.
- ☑ Do not request a second or third opinion.
- ☑ An employee who does not provide a fitness-for-duty certification or who requests additional FMLA leave is no longer entitled to reinstatement under the FMLA.

Thomas J. Laginess

Thomas Laginess, an attorney in our Livonia office, concentrates his practice on labor and employment law and municipal law. He can be reached at (734) 261-2400 or tlaginess@cmda-law.com.

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Claims Against County Prosecutor Dismissed; Immunity Applied


Gregory R. Grant

Greg Grant from our Traverse City office recently defended a Michigan county prosecutor in a civil case in Circuit Court.

The plaintiff in the case was a former criminal defendant who was charged with felony animal cruelty after it was alleged by a complaining witness that the plaintiff shot her dog multiple times with a pistol. The plaintiff vehemently denied the allegations. The plaintiff was found not guilty at the criminal trial. After trial, the plaintiff was charged with three counts of possessing unregistered firearms that were discovered during a search of his home by police. He accepted responsibility for the firearms and paid a fine.

The plaintiff subsequently filed a lawsuit against the county prosecutor alleging various deprivations of his constitutional rights. Specifically, the plaintiff alleged that the prosecutor violated his Fourth Amendment right by knowingly preparing a search warrant that lacked the requisite probable cause. He also brought a claim of malicious prosecution arguing that the prosecutor charged him with the three unregistered firearms in retaliation after his acquittal at trial.

In the civil case, Mr. Grant successfully argued that the prosecutor was entitled to absolute prosecutorial immunity pursuant to statute and the common law. Mr. Grant explained to the Court that the prosecutor's advocatory actions were conducted in connection with initiating and pursuing a criminal prosecution, thereby entitling him to immunity. The Circuit Court agreed and dismissed the prosecutor from the case with prejudice.

Gregory R. Grant

Greg Grant, an attorney in our Traverse City office, concentrates his practice on municipal law, labor and employment law, insurance defense, and commercial litigation. Additionally, he has successfully represented judges, prosecutors, and public defenders. He can be reached at (231) 922-1888 or at ggrant@cmda-law.com.

City Not Liable for Disclosure of "Involuntary Statements" By Former Police Officers


Edward E. Salah

The Michigan Court of Appeals recently decided a case involving two consolidated appeals raising an issue of first impression. The plaintiffs, both former police officers with a municipality in southwest Michigan, sued the city and their Director of Public Safety alleging that the defendants violated MCL 15.395. Both plaintiffs had been the subject of an internal affairs investigation, and alleged that they were required to make "involuntary statements" as part of the internal investigation. The plaintiffs claimed that subsequent statements made by the Director of Public Safety to the media were prohibited disclosures of involuntary statements in violation of MCL 15.395.

The statute at issue was adopted by the Michigan Legislature following the U.S. Supreme Court's decision in *Garrity v New Jersey*, which held that forced statements obtained from police officers during an internal investigation could not later be used in criminal proceedings brought against the officers. The Michigan statute goes further and provides that an involuntary statement made by a law enforcement office is confidential and not open to public inspection, except under four specifically enumerated exceptions.

In affirming the lower court's dismissal of the plaintiffs' claims, the Court of Appeals found that not only were the defendants entitled to governmental immunity, but the statute in question does not expressly create a cause of action for damages, and Michigan law does not permit a court to infer a cause of action against a governmental defendant.

Edward E. Salah

Edward Salah, an attorney in our Livonia office, concentrates his practice on municipal law, insurance defense and utility law. He can be reached at (734) 261-2400 or esalah@cmda-law.com.

Insureds and Insurers Must Carefully Read their Insurance Policies


Douglas J. Curlew

In two seminal opinions, *Wilkie v Auto-Owners Ins. Co.* and *Rory v Continental Ins. Co.,* the Michigan Supreme Court emphatically confirmed that insurance contracts are to be enforced by the courts "as written." The parties to an insurance contract remain free to waive or modify the terms of the contract by mutual consent, but one party cannot demand enforcement of an insurance contract, contrary to the mutually agreed terms, based upon that party's unilateral belief that the contract has a meaning different than what the mutually agreed terms actually provide. In particular, the insured is bound by the agreed terms, despite the reality that most insureds must accept their insurance contracts as offered by an insurer, with no genuine opportunity to negotiate the coverage terms.

Yet under these mandates, both the insured and the insurer must be careful to read the insurance contract between them. An insurer is obligated to know the terms of their insurance policy and will be bound to those terms, even if they fail to read them. On the other hand, in the absence of fraud by the insured, the insurer is equally bound to the terms of the insurance policy; the insurer must specifically describe those exclusions and conditions in the policy in unambiguous terms. Ambiguous terms in an insurance policy (i.e., terms that are capable of conflicting interpretations based upon the words used) may be interpreted against the insurer, if there is no demonstrable, external evidence that the insured and insurer had mutually agreed to one particular meaning for the ambiguous term.

Insurance sales and claims representatives need to be particularly aware of the actual language of the insurance policies with which they deal because the policy terms may prove overly generalized or even ambiguous in specific factual situations. This is particularly true because policy terms are often drafted by the Insurance Services Office (an association of insurers that develops standard policy forms) rather than an individual insurer. Insurers, as much as their insured, are at risk of finding their expectations regarding the meaning of terms of an insurance policy rejected by the courts if these expectations are not based upon a careful reading of the language of the insurance contract.

Douglas J. Curlew

Douglas Curlew, an attorney in our Livonia office, concentrates his practice on appeals, premises liability and insurance law. He can be reached at (734) 261-2400 or dcurlew@cmda-law.com.

CMDA Happenings

Attorney Guest Speaker at Chiefs of Police Conference

T. Joseph Seward, a partner in our Livonia office, was recently invited to be the guest speaker at the International Association of Chiefs of Police Patrol and Tactical Operations Sub-Committee Mid-Year Meeting held in Phoenix, AZ. He spoke to police chiefs on the importance of preparing law enforcement officers for depositions and trials.

If your department is interested in a presentation on preparing law enforcement officers for depositions and trials, or for additional information on the Firm's law enforcement practice group please contact Mr. Seward at (734) 261-2400 or tjseward@cmda-law.com.

Attorney Guest Lecturer on Michigan's Dramshop Act

Andrew Brege, a partner in our Grand Rapids office, was a recent guest lecturer at Grand Valley State University for a joint session of the Hospitality & Tourism Management and Legal Studies sections. Mr. Brege presented on Michigan's Dramshop Act and common law liquor liability and provided a defense perspective on the statute, causes of action, liability issues and defenses. Mr. Brege can be contacted at (616) 975-7470 or abrege@cmda-law.com.

Attorney to Speak at Divorce Support Group

Carla Testani, a family law attorney in our Livonia office, will be presenting at an upcoming Divorce Support Group. She will be giving an overview of the legal aspects of divorce, including child custody, spousal support, child support and the division of marital assets.

The Divorce Support Group is open to anyone contemplating, in the process of, or having difficulty adjusting to divorce. There is no fee to attend the group, and registration is not required. The seminar will take place on May 27, 2014 from 7-9 p.m. in Livonia at Schoolcraft College's McDowell Center, room 205. For additional information on any family law matter, Ms. Testani can be contacted at (734) 261-2400 or ctestani@cmda-law.com.

Office Locations

MICHIGAN

Livonia
33900 Schoolcraft Road
Livonia, MI 48150
Telephone: 734.261.2400
Facsimile: 734.261.4510

Sterling Heights
43409 Schoenherr Road
Sterling Heights, MI 48313
Telephone: 586.731.5000
Facsimile: 586.803.1034

Traverse City
400 West Front Street
Suite 200
Traverse City, MI 49684
Telephone: 231.922.1888
Facsimile: 231.922.9888

Grand Rapids
2851 Charlevoix Drive, S.E.
Suite 327
Grand Rapids, MI 49546
Telephone: 616.975.7470
Facsimile: 616.975.7471

CALIFORNIA

Riverside
3801 University Avenue
Suite 560
Riverside, CA 92501
Telephone: 951.276.4420
Facsimile: 951.276.4405

MISSOURI

Kansas City
1600 Baltimore Avenue
Suite 200B
Kansas City, MO 64108
Telephone: 816.842.1880
Facsimile: 816.221.0353

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To reference previous issues of On Law, please visit www.cmda-law.com.

CMDA: On Law
33900 Schoolcraft Road
Livonia, Michigan 48150
(734) 261-2400
E-Mail: jsherman@cmda-law.com

Our Vision

To meld our legal expertise, professional support staff, technical resources and variety of locations to deliver first rate legal services at a fair value to a full range of business, municipal, insurance and individual clients.

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DAVIS & ACHO, P.L.C.
ATTORNEYS & COUNSELORS AT LAW
33900 Schoolcraft Road
Livonia, Michigan 48150

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