

***First Wednesday — A Monthly Discussion of Employment Law
Issues and Other Hot Topics for Management***



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**State and Federal Leaves of Absence Provide
No Loophole for the Underperforming Worker**

In an interesting twist on family leave law, the California appellate court affirmed a trial court's jury verdict which held that an employee who had taken medical leave could not use the California Family Rights Act (CFRA) to prevent her employer from terminating her. The case is *Neisendorf v. Levi Strauss & Co.*, decided August 29, 2006 (06 C.D.O.S. 9221).

This case explains that an employee who is underperforming cannot invoke leave statutes to avoid the consequences of a well-documented history of performance issues. The court applied the time-honored principal that an employer may terminate for reasons unrelated to the taking of family/medical leave, where the employer can show that termination would have occurred regardless of the taking of leave.

Facts

Barbara Neisendorf was hired as a Vice President by Levi Strauss at an annual salary of \$250,000, plus a signing bonus of \$250,000, relocation expenses, participation in incentive bonus plans, and benefits. During the two years she worked for the company, Neisendorf, an at-will employee, underperformed. Her deficiencies were noted by her supervisor and others, and led to meetings between Neisendorf and her direct supervisor where she refused to acknowledge any performance problem. At the

third meeting, Neisendorf again refused to address the performance problems and offered to resign for a package worth \$1.7 million.

But after learning that she was not eligible for any separation package, Neisendorf took a four week disability leave. Her doctor's note said simply: "Medically, Ms. Neisendorf is unable to work." Levi Strauss properly informed Neisendorf of her leave rights and obligations under the CFRA and the Federal Family and Medical Leave Act of 1993 (FMLA). After eight weeks of leave, Neisendorf was medically cleared to return to work.

Over the next several weeks, Neisendorf, along with her attorney and her psychiatrist, negotiated her return to work with the company. Levi Strauss told her that it did not believe she was legally disabled, but would still work with her to facilitate her return. One of the conditions of her return was that she take responsibility for and address the performance issues that had been problematic since before she took her leave. Thus, after 14 weeks of leave, Neisendorf and the company agreed to certain job accommodations and she was to return to work. However, Neisendorf continued to refuse to acknowledge her performance problems. She was terminated the next day.

Neisendorf filed suit against Levi Strauss, alleging several legal theories. Most were thrown out by the lower court. The trial court found that the company had not violated the leave statutes – including retaliation for taking a leave – in terminating Neisendorf. She appealed that decision, claiming she was entitled to return to work.

CFRA and FMLA Leave

The CFRA allows an employee to take up to twelve weeks of unpaid medical leave for personal or family medical conditions, including care for children, parents or spouses without the loss of job security or other adverse employment actions. (FMLA provides a similar leave entitlement that typically runs concurrently with CFRA leave.) After the leave, the employee is ordinarily returned to the same or equivalent position she had before taking leave. Upon return, accommodations may be required under FMLA to help the employee perform essential job functions.

Summary

The court found that Neisendorf was entitled to take leave, but was not able to return to work without accommodations. The company worked with her, and a return-

to-work specialist, to try to accommodate her return. A condition of her return was that she address the performance deficiencies and agree to a development plan, which she was unwilling to do.

Because she refused to address her performance issues and more than twelve weeks had passed, Neisendorf could not use the CFRA as extra job protection for issues unrelated to her leave. Stated another way, she could not overcome the legitimate, non-discriminatory reasons for the company's decision to terminate based on her work history and ongoing failure to address the performance issues.

The court found that if an employee cannot return to work after a leave is exhausted, the employer is no longer under an express statutory duty to return the worker to the same position she held before the leave. The bottom line was that Neisendorf could not use the CFRA or the FMLA to escape a termination that would have occurred with or without the leave.

Conclusion

The court explained that an employee cannot escape the day-to-day realities of her job performance by taking leave and then seeking shelter under the reinstatement obligations placed upon employers. The requirements under CFRA and FMLA do not allow an employee to abuse the system to escape job performance issues that were clearly pre-existing and well-documented.

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