

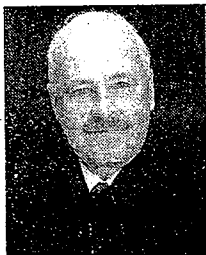
Judge Determines FMLA Notification Is Employer's Responsibility

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In the first case of its kind, a federal judge has ruled that an employer violated the Family and Medical Leave Act by firing an employee after failing to notify her that her 78-day leave of absence was counted as FMLA leave.

In a six-page opinion in *Dintino v. Doubletree Hotels Corp.*, Senior U.S. District Judge John P. Fullam held that "the employee is not required to mention in her notice to her employer that she is taking her leave in accordance with the provisions of the FMLA."



FULLAM

Instead, he said, "where there is ambiguity in the employee's request for leave, the burden is on the employer to determine whether the leave is FMLA-qualifying."



CONSOLE

As a result, Fullam granted partial summary judgment in favor of Audrey Mintz Dintino on the issue of FMLA liability. But he also ruled that a jury must decide how much to award Dintino in damages.

In a significant final section of the opinion, Fullam ruled that Dintino is entitled to "liquidated damages" because Doubletree's decision to fire her "constituted an interference with [her] exercise of FMLA rights."

Doubletree cannot legally escape from paying liquidated damages, Fullam said, because it "cannot establish that it honestly intended to ascertain the dictates of the FMLA and act in conformance with it."

Dintino's lawyer, Stephen G. Console,

hailed the ruling as an important precedent that will put employers on notice of their duties under the FMLA.

"As the architect of a maze of employee benefits, a corporation cannot be allowed to fling open a trap door and unfairly terminate employees who are absent from work due to serious health or family matters and who have not been notified that their FMLA leave is being exhausted," Console said.

In the suit, Dintino, 32, of Cherry Hill, N.J., claims she was fired after taking an extended leave of absence due to a complicated and difficult pregnancy.

Dintino had worked for Doubletree as manager of telemarketing since September 1992. She claims that her supervisor, Jack Ferguson, began treating her differently as soon as she informed him of her pregnancy in late 1993 or early 1994 and "screamed at her" when she told him that she was planning to begin her maternity leave on July 15, 1994, four weeks before her due date.

According to the suit, Dintino suffered medical complications, and her physician advised her even before the beginning of her planned leave to stop work immediately and stay in bed for the remainder of her pregnancy.

Dintino gave Ferguson her doctor's letter ordering bed rest and then began her medical leave on June 21, 1994, the suit says. Her son was born on Aug. 9, 1994.

In October, Dintino wrote a letter to Ferguson saying her doctor had released her from her medical leave of absence on Oct. 14 and that she planned to remain at home for an additional 12 weeks — the time granted by the FMLA — to care for her newborn son.

But in late November, Ferguson wrote to Dintino to say that her position had been terminated in September because she had "abandoned" her job.

Based on the uncontested facts, Fullam found that Doubletree "failed to comply with federal regulations" because it never gave Dintino notice that the leave she began on June 21 was being counted against her annual FMLA leave.

The first version of the regulation said that such notice "should" be given to employees, Fullam noted, while the final version, implemented in 1995, said that such notices "must" be given.

But regardless of which version was applied to Dintino's case, Fullam found that Doubletree "failed to meet its responsibilities."

Both the interim and final regulations "contained such similar language that Doubletree was on notice of its burden," Fullam wrote. "It had to provide the plaintiff with written notice, and such notice would be expected to include, if applicable, a statement that the plaintiff's leave would be treated as FMLA leave."

Fullam said it is always the employer's responsibility to designate whether leave — paid or unpaid — is FMLA-qualifying.

In Dintino's case, he said, Doubletree also failed to comply with its own written policies on FMLA leave. The internal policy calls for the company to give a written memorandum to any employee who gives notice of his or her intent to take FMLA leave. The memo serves to confirm the company's receipt of the employee's notice of the leave and sets forth some of the employee's basic rights and obligations.

Dintino never received such a memo, Fullam said. Instead, she was given only a "Request for Leave of Absence" form which "made no mention of FMLA leave," the judge found.

Fullam ruled that such a failure to follow corporate policy — combined with Doubletree's failure to take steps to discover the type of leave Dintino intended to take — confirmed that the first 78 days of Dintino's leave were "not treated as FMLA leave by Doubletree."

The testimony of Ferguson bolstered that finding, Fullam said, because he conceded that the company had "dropped the ball" if Dintino was never given her FMLA memo. When asked if she were ever told that her leave was being counted against her FMLA leave, Ferguson said "... no, it was considered a maternity leave."

(Copies of the six-page opinion in *Dintino v. Doubletree Hotels Corp.*, PICS NO. 97-2459, are available from The Legal Intelligencer. Please refer to the Pennsylvania Instant Case Service order form on Page 6.)