



Cincinnati Law Library News

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Recent Sixth Circuit Case Instructive as to How an Employer May Deal with Inadequate FMLA Certifications
Taft Stettinius & Hollister LLP Fact Sheet

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A challenge for employers administering FMLA leaves is how to police questionable requests for FMLA leaves, including those involving inadequate FMLA certifications. The recent Sixth Circuit case, *Novak v. MetroHealth Medical*, provides guidance for an employer faced with this challenge. This article will begin with an outline of the *Novak* case and conclude with a list of steps an employer should take to proactively administer FMLA leaves.

I. *Novak v. MetroHealth*
Donna Novak claimed that her employer, MetroHealth, violated the FMLA when it terminated her under a no-fault attendance policy. 2007 WL 2807004 (CA 6, Sept. 28, 2007). Ms. Novak claimed that some of her absences should have been FMLA protected either because of her own serious health condition (a back injury) or because she needed to care for her adult child who had a serious health condition (postpartum depression). The trial court granted the employer summary judgment finding that Ms. Novak's absences were not FMLA protected and the Sixth Circuit Court of Appeals affirmed.

It was established before the trial court that Ms. Novak sought to have some of her absences excused under the FMLA when she realized that she had too many points under the no-fault attendance policy. She submitted to MetroHealth a medical certification form filled out by a physician who had treated her back six months prior to the absences at issue. MetroHealth reviewed the medical

certification and noted that the form was incomplete as it was missing a description of the medical facts and a statement as to the likely duration of the condition. Ms. Novak contacted an assistant at her doctor's office; told the assistant what to write in the incomplete sections of the form; and had the assistant submit the form to the employer without having the physician approve the additions to the form. In a meeting between MetroHealth and Ms. Novak to discuss the applicability of the FMLA to the absences, MetroHealth questioned the authenticity of the medical certification forms and had Ms. Novak execute a release authorizing the employer to contact Ms. Novak's physician. MetroHealth also gave Ms. Novak a week to submit any additional medical certification forms. MetroHealth contacted the physician and the physician told MetroHealth that he had not treated Ms. Novak in the six month period preceding the absences at issue; that he had no personal knowledge regarding the condition of her back during the pertinent time period; and that he did not complete the entire certification form.

Ms. Novak then spoke with her doctor; updated him on treatment she was receiving from another doctor; and had him fill out a third certification form based upon this second-hand information. Additionally, Ms. Novak submitted a medical certification form which stated that her eighteen-year-old daughter suffered from postpartum depression and yet another medical certification which stated that her newly born grandson was sick and Ms. Novak was needed to help

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care for her grandson.

After having provided Ms. Novak with additional time to submit additional certifications and having spoken with her treating physician regarding the medical certifications, MetroHealth determined that the “contradictory information” provided did not qualify her absences for FMLA protection and she was terminated under the no-fault attendance policy.

A. FMLA Analysis-Inadequate Medical Certification and Ramifications

Ms. Novak claimed that her back injury was an FMLA-qualifying condition and that her submitted certification forms sufficiently established the existence of the condition to protect her under the FMLA. The Court began its analysis by noting that, while the medical certification provided by an employee is presumptively valid if it contains the required information and is signed by the health care provider, the employer may overcome this presumption by showing that “the certificate is invalid or inauthentic.”

The Court found that the medical certifications submitted by Ms. Novak were insufficient to establish the existence of a serious health condition under the FMLA. The first certification submitted was insufficient because it failed to contain the date the condition began, the probable duration of the condition, and the appropriate medical facts within the health care provider’s knowledge. The second medical certification was inauthentic because MetroHealth demonstrated that the contents were filled in by an assistant in the office and not authorized by the

health care provider. The third medical certification form was unreliable because MetroHealth demonstrated that the health care provider who signed the form did not have personal knowledge of her condition for the pertinent dates.

Ms. Novak argued that MetroHealth should have told her about the deficiencies and given her a reasonable opportunity to correct the deficiencies. The Sixth Circuit agreed that an employer who finds a certification to be incomplete has a duty to inform the employee of the deficiency and provide the employee with a reasonable opportunity to cure. The Sixth Circuit also acknowledged that some other courts will impose this duty on a certification which is merely “inadequate” rather than “incomplete.” However, the Sixth Circuit found that MetroHealth satisfied its obligation by contacting the health care provider to authenticate the previously submitted medical certifications and by permitting Ms. Novak to submit three additional medical certification forms.

B. FMLA Analysis-Employer Not Required to Utilize Second Medical Opinion Process

Ms. Novak also argued that the FMLA requires an employer to utilize the FMLA’s second opinion process before an employer may challenge a medical certification and deny an employee FMLA leave. The Sixth Circuit rejected this argument noting that the FMLA permits, not requires, an employer to utilize the second opinion process should an employer doubt the validity of a medical certification. Therefore,

MetroHealth’s decision not to utilize the second medical opinion process did not preclude MetroHealth from disputing the validity of the medical certifications.

C. FMLA Analysis- Care for an Adult Child as FMLA Qualifying Ms. Novak alternatively applied for FMLA leave to care for her adult daughter who was suffering short-term postpartum depression. The Sixth Circuit noted that the FMLA authorizes a parent to take leave to care for a child over 18 years of age or older only if the child is suffering from a serious health condition and is “incapable of self-care because of a mental or physical disability.”

Significantly, the Sixth Circuit ruled that “incapable of self-care because of a mental or physical disability” requires that the adult child be “disabled for purposes of the ADA.” The Court noted that a disability under the ADA requires a “physical or mental impairment that substantially limits one or more of the major life activities of the individual” and that the EEOC’s regulations specifically exclude from the definition “temporary, non-chronic impairments of a short duration, with little or no long term or permanent impact.” Because Ms. Novak’s daughter’s postpartum condition was not severe and only lasted one or two weeks, absences for Ms. Novak to care for her adult daughter were not FMLA protected.

The Court also noted that the certification relating to the sickness of Ms. Novak’s

grandchild and the need for Ms.

Novak to care for him did not provide protection under the FMLA because the "FMLA does not entitle an employee to leave in order to care for a grandchild." However, a caveat should be noted here. The FMLA does provide for leave for someone who stands in loco parentis to a child. The Department of Labor regulations define in loco parentis as someone with day-to-day responsibilities to care for and financially support a child" and some grandparents could qualify for leave eligibility under this provision.

II. Steps to Properly Enforce FMLA Policies to Prevent Fraudulent Use of Time Off

The following is a list of actions an employer can take to effectively administer its FMLA program:

Require medical certification.

Publish and enforce the 15 day deadline for submitting medical certification.

Include in your FMLA forms authorization to contact the employee's physician, and use it when abuse is suspected.

Scrutinize completed medical certifications:

Certification for conditions outside physician's specialty.

Incomplete.

Inconsistent information.

The wrong patient.

Use second opinion process

where appropriate; forego second opinion process where it is more effective to otherwise question medical certification.

Track absence patterns and timing for fraud.

Pay attention to rumors of abuse.

Surveillance.

Use temporary transfer provisions.

Run the FMLA clock.

Require the use of PTO.

Reduce exempt employee's pay based on amount of leave taken.

Document reasons for absences.

Enforce call-off rules and notice requirements.

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Cincinnati Law Library Association
Welcomes
Mary Jenkins

The staff and board of trustees of the Cincinnati Law Library welcome Mary Jenkins as our new law librarian and director.

Ms. Jenkins joins us from the Franklin Pierce University in New Hampshire where she was an associate professor and the director of library services, where she says she prided herself on her outreach efforts, development of user-centered services, and programming.

At Franklin Pierce she led all aspects of library service, instructional technologies, and media services. She managed that library's efforts in their expansion of services & resources, initiating the integration of information literacy & technological competencies – part of which was a transition to web-based resources, and off-site access.

In the late 1980s, Mary was a librarian at Case Western Reserve University School of Law. She is eager to reconnect with law library community and to understand user needs for the foreseeable future.

Please stop by and say “hello” if you are in the Cincinnati Law Library or contact me anytime at mjenkins@cms.hamilton-co.org or call me at 513-946-5263. I look forward to meeting library users and members.



The New Ohio County Law Library

By Charles Kallendorf

It's not always clear what exactly what constitutes a "library," the University of Akron's George Knepper wrote in his *Ohio & Its People* that "but if we assume it's a collection of reading material which can be borrowed, then a number of Ohio towns have a claim to being among the first to operate one. Belpre, in Washington County, had a circulating collection in the late 1790s; Dayton and Cincinnati soon followed. By 1840 at least 140 libraries had been incorporated in Ohio, although all but a handful were small and sporadically managed.

"Most were subscription libraries that loaned to paying members only, rather than circulating libraries open to the general public. Some special collections appeared at an early time, among them the State Library, established in 1817 to provide information to state officials."

The concept of the county law library is older than anyone here, its history going back to New York, where the Allegheny County Law Library came into being in 1806; by 1876 it had 2,500 volumes.

In 1832, Samuel Culbertson and his associates incorporated a "Dane Law Library" in Zanesville, Ohio. Was it our first?

By 1876 Stephen Griswold was reporting to the U.S. Interior Department that "In nearly all of the states, provision is made by law for the distribution of the reports, statutes, and state papers of the state to each of the counties therein, together with such books as are purchased by means of small grants from the county treasury, by order of the board of supervisors or the county court, from what may be called a county law library of which the county clerk is custodian." Christine Brock, writing in the *Law Library Journal* in 1974, noted, however, that while 39 states had statutory provisions for county law libraries in 1970, many hadn't been passed until after Griswold's report. (Twenty-eight of those listed still have "county law library" statutes).

In Ohio, the statutes governing county law libraries was passed in April 1872, but several –

including Cleveland, Dayton, and this one – were already incorporated and serving their respective areas.

What was in our initial collection is not known exactly, but "early in February 1847, a huge bookcase with a capacity to hold several hundred volumes was procured at an expense of \$94.50, and set up for the library at the right of the entrance within the courtroom of the Common Pleas Court."

That courthouse caught fire and burned two years later, and all but a few books were saved.

We weren't as lucky in 1884 when the courthouse was again burned in three days of rioting sparked by the verdict in a murder trial here in Cincinnati. The state militia restored order quickly, but our entire collection – save maybe six or seven books – was lost. The Library was well-known nationally in that time, and contributions of both money and material came pouring in from New York, Boston, and as far away as Arkansas, Wyoming, and the Montana Territory. By 1899 the collection was well over 20,000 volumes; today it's about 100,000.

But the people and times have changed since the 19th & 20th centuries. The need for available current information very much continues, but the days of the massive room offering only musty old books are gone – replaced largely with a demand for computer-based web access. Many law libraries face the dual challenges of providing costly and critically important information resources while simultaneously acknowledging just as important budgetary constraints.

What became of Zanesville's Dane Law Library ? We don't really know, but there was a Dane County Law Library in Madison, Wisconsin. In 1999, because of its budget problems, it merged via contractual agreement with that state's law library and is now a branch of that organization. It's now the Dane County

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Legal Resource Center. The Milwaukee Legal Resource Center had followed a similar path three years earlier in 1996. A small branch with 6,700 or so volumes, the Dane County Center's focus is on providing both the legal community and general public with a variety of legal information services, both online and in person. There are specialized collections for pro se litigants, and services available to the inmates of the Dane County Jail. Free in-house access to internet and legal research databases is also available, as are a variety of court forms and booklets. Though of a bit different nature Duquesne University Center for Legal Information and the Allegheny County Law Library in Pittsburgh merged, in 1999, creating the only private academic & public county law library operation in the country.

The Allegheny County Law Library is in part a free, public law library, although circulation privileges are fee-based. Its stated mission is "to meet the research needs of the law school's students and meet the demands of their curriculum; additionally to serve the needs of the University community and alumni, and, finally, to serve the practicing bar, courts' legal staff, and the public-at-large." Its collection consists of more than 150,000 volumes following the AALL standard for county law libraries, with all current Pennsylvania primary and secondary source material as well as those from contiguous states and California & Florida. It also has an extensive microform and video tape collection, including more than 100 taped trial cases from CourtTV.

Dane County Legal Resource Center @ <http://wsll.state.wi.us/branch/dclrc/>
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November 2007 Law Library Newsletter

<p>INSIDE THIS MONTH</p> <ul style="list-style-type: none"> • Inadequate FMLA Certifications • Tech Tip: Save Time and Money • Welcome to our New Director • New Ohio County Law Library

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