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Wisconsin Supreme Court Requires Employers to Exercise "Clemency and Forbearance" When Enforcing Attendance Policies

In *Stoughton Trailers, Inc. v. Geen*, 2007 WI 105, the Wisconsin Supreme Court issued yet another unfavorable decision interpreting Wisconsin's disability discrimination statute. The Court decided that Stoughton Trailers, Inc. ("Stoughton Trailers") failed to reasonably accommodate an employee, in part, because it did not extend him "clemency and forbearance" in enforcing its attendance policy. The Court also decided that the employee was unlawfully terminated under Stoughton Trailers' attendance policy because Stoughton Trailers did not follow the requirements of its own policy.

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The Facts

Geen worked for Stoughton Trailers, a manufacturer of semi-trailers. Stoughton Trailers implemented a qualified no-fault attendance policy for its employees. Under that attendance policy, employees received "occurrences" for tardiness and absences, subject to certain limited exceptions. One exception encompassed qualified absences under state and federal family and medical leave laws ("FMLA"). If an employee was absent from work due to a medical condition, Stoughton Trailers provided that employee with a FMLA form to complete and return to human resources within 15 days. If an employee did not return a completed FMLA form, but instead submitted other proof that the absence resulted from a medical condition, the company assessed one occurrence under its attendance policy. Stoughton Trailers' policy required that employees with six or more occurrences be terminated from employment.

Geen suffered from migraine headaches. Stoughton Trailers did not dispute that Geen's migraine headaches constituted a disability under the Wisconsin Fair Employment Act ("WFEA"). The severity of his headaches prevented Geen from working from mid-December 1996 to early January 1997. Geen provided Stoughton Trailers with medical documentation of his headaches for this time period, but did not submit the requisite FMLA form. In accordance with its policy, Stoughton Trailers assessed Geen with one occurrence for his extended absence. Prior to this occurrence, Geen had already received 4.5 occurrences for reasons unrelated to his disability. The additional occurrence for the mid-December 1996

through early January 1997 absence placed Geen at 5.5 occurrences, one-half occurrence short of termination.

Geen returned to work on January 8, 1997. On January 24, 27 and 28, however, Geen called in sick to work stating that he again had migraine headaches. Geen returned to work on January 29. That same day, Stoughton Trailers provided Geen with a standard letter informing him that he would need to submit a completed FMLA form within 15 days of the date of the letter to avoid having his three-day absence count as an additional occurrence under the attendance policy.

In response, Geen provided Stoughton Trailers with two notes from his physician. In the first note, provided on January 30, Geen's physician explained that Geen showed "textbook examples of migraine headaches" and that he was evaluating those headaches for treatment. In the second note, provided on January 31, Geen's physician indicated that Geen's migraine headaches caused Geen's absences on January 27 and 28. However, neither note provided by Geen made reference to his January 24 absence. As a result, Stoughton Trailers assessed Geen an occurrence for his January 24 absence and terminated his employment that same day for accumulating 6.5 occurrences under its attendance policy. This termination decision was made only two days after Geen received the standard letter stating that he had 15 days to provide FMLA documentation.

Also on January 31, Stoughton Trailers informed Geen both that he could appeal the termination decision to Stoughton Trailers' Attendance Review Board ("Review Board") and that he could submit additional medical documentation to the Review Board. The Review Board rejected Geen's appeal on February 21, 1997. Importantly, the Review Board's decision to uphold the termination was made twenty-one days after Geen received the standard letter which required him to provide FMLA documentation within 15 days. Geen did not provide any additional medical documentation prior to the Review Board's decision.

The Lengthy Legal Process Prior to the Wisconsin Supreme Court Decision

Shortly after receiving notice that the Review Board rejected his appeal, Geen filed a complaint with the Department of Workforce Development ("DWD") alleging that Stoughton Trailers terminated his employment based on his disability. Over the next six years, the case was litigated before the DWD, the Labor and Industry Review Commission ("LIRC"), Dane County courts and the court of appeals.

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Ultimately, LIRC concluded that Stoughton Trailers terminated Geen's employment because of his disability, inasmuch as the company had counted two disability-related absences as occurrences under its attendance policy. LIRC also concluded that Stoughton Trailers had failed to reasonably accommodate Geen.

The Wisconsin Supreme Court's Decision

Stoughton Trailers' Termination Decision Was Unlawful

The Court affirmed LIRC's conclusion that Stoughton Trailers terminated Geen's employment because of his disability, but based its finding on alternate, narrower grounds. Specifically, the Court found that by terminating Geen's employment on January 31, three days after Geen returned to work, Stoughton Trailers had failed to follow the terms of its own attendance policy inasmuch as it did not provide Geen with 15 days to submit the FMLA form. Because Stoughton Trailers failed to follow its own policy, the Court reasoned that Geen's final occurrence was invalid.

In reaching this conclusion, the Court ignored the fact that the Review Board made its decision to uphold the termination after the 15-day period had elapsed, and that Geen had not provided any FMLA paperwork during that 15-day period. The Court reasoned that Geen's employment was "terminated" on January 31 (the date the company informed Geen he was being terminated for accruing 6.5 attendance occurrences), and not on February 21 (the date the Review Board rejected Geen's appeal).

Unlike LIRC, the Court expressly avoided answering the bigger question - whether a termination for exceeding the maximum number of permitted absences under a qualified no-fault attendance policy was a termination "because of a disability" within the meaning of the WFEA, when some of the employee's absences were caused by a disability while other absences were not.

The Legal Obligation to Exercise Clemency and Forbearance

The Court also upheld LIRC's conclusion that Stoughton Trailers failed to reasonably accommodate Geen. Specifically, the Court held that Stoughton Trailers did not reasonably accommodate Geen in two respects.

First, Stoughton Trailers failed to reasonably accommodate Geen by failing to provide him with the 15 days provided under its policy to submit a completed FMLA form. Second, Stoughton Trailers failed to reasonably accommodate Geen by failing to extend him "clemency and forbearance" by temporarily tolerating his

disability-related absences while his physician explored treatment of his migraine headache condition.

The Court's holding requires employers to exercise "clemency and forbearance" by not immediately terminating an employee when the employer is aware that medical intervention is underway regarding the condition causing the absences. The Court provided no guidance on important issues such as what "clemency and forbearance" means with respect to work rules other than attendance policies, and how long an employer is obligated to extend "temporary" clemency and forbearance with respect to an employee's medically-related absences.

While the Court ultimately declined to define the relationship between disability-related absences and attendance policies, this decision will undoubtedly draw further attention to the application of qualified no-fault attendance policies and, indeed, to the application of attendance policies in general. When enforcing attendance policies, employers should proceed with caution before assessing discipline against an employee for disability-related absences.

From a broader perspective, the Court's decision highlights the need for employers to carefully evaluate all contemplated discipline and termination decisions to ensure such decisions do not run afoul of the law. Please feel free to contact a member of Reinhart's Labor & Employment Department if you have any questions about the impact of this ruling on your business.