

EMPLOYEE HANDBOOKS MAY EXPAND EMPLOYER OBLIGATIONS

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HR professionals everywhere take heed: policies set out in employee handbooks and employer communications can create greater obligations for employers than those required by law. This is precisely what a federal appellate court recently held in *Peters v. Gilead Sciences Inc.*, 533 F.3d 594 (7th Cir., July 14, 2008).

In *Peters*, the plaintiff was employed by Gilead Sciences Inc. (“Gilead”), which was based in California. Peters lived in Indiana and was permitted to telecommute in performing his sales operations in a 3-state area. The plaintiff injured his neck and shoulder in a work-related car accident and was permitted to take a short medical leave during which he had corrective surgery. Upon return to work the plaintiff was still unable to perform his job requirements and Gilead approved the plaintiff’s request for what he thought was leave taken pursuant to the federal Family and Medical Leave Act (“FMLA”).

Recall that the FMLA requires that covered employers allow “eligible employees” to take up to 12 weeks unpaid leave within a 12 month period to attend to, among other things, serious medical conditions. In order to be an “eligible employee” for purposes of the FMLA an employee must have worked at least 12 months and at least 1,250 hours over the previous 12 months. In addition, an employee must meet the “50/75” rule, *i.e.*, the employee must be employed at a worksite where 50 or more employees are employed by that employer or within 75 miles of that worksite. The plaintiff in *Peters* was not an “eligible employee” under the FMLA because, as a remote telecommuter, he did not meet the “50/75” rule.

Gilead replaced the plaintiff before his 12 weeks of medical leave was completed and the plaintiff filed a lawsuit under the FMLA, breach of contract and the doctrine of promissory estoppel. Promissory estoppel is an equitable contract remedy that permits enforcement of a promise that induces actual and reasonable reliance on the part of the promisee.

On appeal, the court focused on Gilead’s employee handbook and correspondence Gilead sent to the plaintiff. Specifically, the Gilead employee handbook contained a section entitled “FAMILY AND MEDICAL CARE LEAVE” and a subheading “ELIGIBILITY.” This section set out the basic eligibility requirements for FMLA leave as provided under federal law, but did not contain the 50/75 provision. In addition, the court found relevant letters sent to the plaintiff regarding his

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medical leave that once again recited the 12-month, 1,250 hour prerequisites but listed no further requirements or exceptions. Thus, on their face, the employee handbook and letters guaranteed 12 weeks medical care leave to all otherwise eligible employees, not just those who also satisfied the 50/75 requirement.

The U.S. Court of Appeals for the 7th Circuit (which does not cover Nebraska) concluded that the plaintiff stated valid claims for promissory estoppel and breach of contract, even if the FMLA did not technically apply. The case has now been sent back to the trial court where the case will be heard by a jury.

LESSON: The *Peters* decision is not just limited to the FMLA, and can easily be read to cover instances where an employer, in its employee handbook or communications, confers employee benefits and protections that are greater than what is legally required. *Peters* serves as a cautionary reminder to Nebraska employers that employee handbooks and communications may, if not properly drafted, unknowingly create legal liability for the employer. Because the doctrine of promissory estoppel relied upon by the *Peters* court is recognized in Nebraska it is quite possible that a Nebraska employer may find itself in the same position as Gilead. *Peters* necessitates a reexamination of employee handbooks, employer policies and procedures and employee communications to determine whether the language used creates greater obligations than intended by the employer.

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