

FMLA Case Study

Since June 15, 2000 Jose Ramos has worked full-time at Fancyfootwork, Inc., a mid-size fabrication plant employing 250 workers which uses the calendar-year method of defining the FMLA leave year. On June 11, 2010, he was injured on the job and unable to work. At the time of his injury he had not taken leave of any kind that calendar year. Within five business days of the injury he received a notice from his employer designating his time off work as FMLA leave and informing him that he must present a fitness-for-duty report before returning to work. On Monday, August 30, 2010, after missing 55 working days, he returned to work.

One month later his father, who lives in another city six hours away, suffered a stroke and required Jose's help immediately. Jose called his supervisor to tell him what had happened and immediately left town to be with his father. A week later he phoned his supervisor to say that he would need another week to care for his father before he could return. When he returned a week later, after missing ten days of work, he received a disciplinary notice for absenteeism citing the company's attendance policy of issuing discipline to anyone who has ten or more absences within a six-month period. Jose's union contract does not provide for any family leave, paid or unpaid.

- 1) What protection, if any, would the FMLA provide Jose from being disciplined for this absence? Would he have any other possible defense, apart from the FMLA?

Before we can get to the issue of what defenses Jose may have with respect to the disciplinary notice, we must first review how the FMLA did or didn't apply to the absences that led to this disciplinary notice. To do that we must review the events that took place prior to this latest absence.

Based on his length of service and full-time employment, the number of employees employed at Fancyfootwork, and the fact that at the time that he was injured on the job Jose had not taken leave of any kind earlier in the year, Jose was eligible for 12 weeks of FMLA leave at

the time of his on-the-job injury in June 2010. Jose's employer was entitled to charge the 55 days of work he missed due to his injury to FMLA leave -- the injury was serious enough to incapacitate him for well over three consecutive days and we can safely assume that he underwent a regimen of treatment for such a serious injury.

The fact that this injury was almost certainly covered under workers' compensation is irrelevant - FMLA clearly applies here. In fact, a worker would be wise to invoke FMLA during such a period because in many states being covered under workers' compensation does not protect one's job as the FMLA does.

With respect to his second absence, Jose's father clearly qualifies as a family member under the FMLA and his sudden stroke would also qualify as a serious health condition. Also, despite having missed 55 working days in the previous year Jose would still meet the 1,250 hour threshold for being eligible for FMLA for this family health crisis. However, at the time Jose called in to his supervisor to explain the family emergency Jose only had five days of FMLA left available to him (assuming a five-day/40 hour week, Jose had used 11 weeks and thus had only one week of FMLA left). While he was entitled under FMLA to the first week he spent caring for his father, he was not eligible for the second.

Despite not having FMLA leave available for that second missed week of work, Jose would still have some protection from his employer's discipline under the FMLA because the discipline was based on the company's attendance policy of issuing discipline to anyone who has ten or more absences within a six-month period. In Jose's case only the second week of absence to care for his father could be counted against him (the other 12 weeks, including his first week out to care for his father, are covered under FMLA and thus cannot be counted against him).

Finally, presumably under Jose's union contract discipline must be based on just cause, therefore Jose would only be subject to discipline if his five-day absence to be with his father was excessive based on the various factors that constitute just cause - length service, previous

discipline, appropriateness of penalty, and how employer has dealt with similarly situated individuals previously.

- 2) A month later Jose moves in with his girlfriend who's due to have their child within the next four weeks. Can Jose take FMLA leave to be with his newborn, and if so, when is the soonest he can take this leave and how much is available to him?

At this point Jose has run through his 12 weeks of FMLA and therefore would not be able to take FMLA leave for newborn care until January 1, 2011, when he would have another 12 weeks available to him under the calendar-year method of defining FMLA leave that his employer uses.

- 3) If Jose is eligible to take FMLA leave to be with his newborn, would this in any way affect the amount of FMLA available to him if his father should suffer another stroke a year after his first?

Yes, because any time Jose takes to be with his newborn earlier in 2011 would not be available to him should his father suffer another stroke within the same calendar year. For this reason Jose may want to avoid exhausting too much time to be with his newborn in order to have some time available should his father's condition worsen.