

# EMPLOYMENT LAW ALERT

## IMMEDIATE REINSTATEMENT REQUIRED UNDER FMLA

The Sixth Circuit Court of Appeals has ruled, in a case of first impression, that an employer must immediately reinstate an employee returning from a leave governed by the Family Medical Leave Act (FMLA) to the employee's same, or equivalent, position. The employer must reinstate the employee no later than two days after the employee is able to return to the job. Employers cannot take additional time to locate an equivalent position or to integrate the returning employee to the workforce.

In *Hoge v. Honda of America Manufacturing, Inc.*, \_\_\_ F.3d \_\_\_ (2004) the Court found that Honda violated the FMLA when it took approximately a month to reinstate Ms. Hoge to an equivalent position when she tried to return to work without advance notice. Her prior position was not available because of model changeover. When an equivalent position became available, Ms. Hoge had been brought back to work under Honda's "Gradual Return to Work" (GRTW) program which started her on a part-time basis and gradually increased her hours to full-time over a three-week period.

Even though Ms. Hoge was also protected by the Americans With Disabilities Act (ADA) since she required a position which accommodated her back condition, Honda was not afforded additional time to locate such a position when Ms. Hoge was ready to return to work after an FMLA leave. Under the FMLA an employee cannot be required to take more leave than necessary to address the circumstances for which the leave was taken. Thus, an employer would violate FMLA by extending an employee's leave by not immediately reinstating the employee. FMLA regulations provide that an employer is entitled to "reasonable notice" of an employee's ability to return to work – with "reasonable notice" defined as two days. Therefore, an employer has only two days to reinstate the employee. In this instance, the Court awarded Ms. Hoge damages for her lost compensation on the days she was required to be out of work and attorney fees and costs. The Court did not render an award of liquidated damages, concluding that Honda had made a good faith argument for its actions.

Alert Tip: There no longer remains a dispute as to when employers must reinstate returning FMLA leave employees: Employers must reinstate employees who have complied with reinstatement requirements under the FMLA no later than two days after receipt of notice of the employee's ability to return to work. Employers can require medical certification before the employee can return to work and an employee is entitled to be reinstated to the same or equivalent position held before an FMLA leave, even if the employee was assigned to that position in order to accommodate a disability.

## Sexual Stereotyping Constitutes Sex Discrimination and Sexual Harassment

The Sixth Circuit Court of Appeals has held that the plaintiff, a transsexual, stated actionable claims of sex discrimination and sexual harassment under Title VII on the basis of his gender non-conformity. *Smith v. City of Salem*, 378 F.3d 566 (2004).

Mr. Smith, a lieutenant in the Salem Fire Department, considered himself a transsexual and had been diagnosed with Gender Identity Disorder. Following the diagnosis, Smith began to express “a more feminine appearance on a full-time basis.” His co-workers questioned his appearance and commented that he was not “masculine enough.” Mr. Smith decided to inform his immediate supervisor of the diagnosis and his likely future physical transformation from male to female. City officials devised a plan to force Mr. Smith’s resignation by requiring him to undergo three separate psychological evaluations. Mr. Smith learned of the plan through the city safety director and filed a charge of discrimination with the E.E.O.C. Four days after receiving a “right to sue” letter, Mr. Smith was suspended for a violation of a city policy.

The Court held that discrimination or harassment directed toward an employee who is a transsexual and therefore fails to act like and/or identify with the gender norms associated with his or her sex constitutes sex stereotyping. Sex stereotyping based on a person’s gender non-conforming behavior is impermissible discrimination, irrespective of the cause of that behavior; a label, such as ‘transsexual’ is not fatal to a sex discrimination claim.

***Alert Tip:*** Employers in the Sixth Circuit’s jurisdiction (including those in Michigan) must be aware that discrimination or harassment based upon the actions of an employee that may not be “normal” for that employee’s sex, is just as likely to lead to costly litigation as is any other form of discrimination or harassment. Hostility directed toward effeminate men or to masculine women can easily be linked to sex stereotyping and is prohibited in the workplace.

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<b>Employment &amp; Labor Law</b>		Mary A. Kalmink	(313) 965-8263
Barbara A. VanZanten, Co- Practice Group		Robert A. Lusk	(248) 988-5847
Leader & Editor of Employment		Mark W. McInerney	(313) 965-8383
Law Alert	(313) 965-8290	William A. Moore	(313) 965-8674
Fred W. Batten	(313) 965-8804	Robert Nyovich	(248) 988-5843
Joseph C. Bennett	(248) 988-5850	Rachelle G. Silberberg	(313) 965-8379
P. Robert Brown, Jr.	(313) 965-8311	Reginald M. Turner	(313) 965-8318
Jennifer M. Buckley	(313) 965-8371		
Stephanie J. Clifford	(313) 965-8368	<b>Employee Benefits</b>	
Frederick R. “Fritz” Damm	(313) 965-8241	Edward C. Hammond	(248) 988-1821
Cara Epp	(248) 988-1829	Florence M. Vincent	(248) 988-5854
Maria C. Fracassa	(248) 988-5899		
John L. Gierak		<b>Immigration</b>	
Co- Practice Group Leader	(248) 988-5845	Juli A. Gammon	(313) 965-8809
Danon D. Goodrum	(313) 965-8817	Elissa M. Pinto	(313) 965-8579
Michael W. Groebe	(313) 965-8818	Kelly Neville (Legal Assistant)	(313) 965-8807

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