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STATE OF WASHINGTON

NO. 87056-0

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

NO. 294382

COURT OF APPEALS, DIVISION III
OF THE STATE OF WASHINGTON

ROBERT CHANEY

Respondent,

v.

PROVIDENCE HEALTH CARE d/b/a SACRED HEART MEDICAL
CENTER & CHILDREN'S HOSPITAL

Petitioner.

ANSWER TO PETITION FOR REVIEW

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TABLE OF CONTENTS

	<u>Page</u>
I. STATEMENT OF THE CASE	1 - 5
II. ARGUMENT	5 - 17
A. Considerations for Petition	5 - 6
B. The Law and Regulations Applicable	6 - 9
C. Return to Work Certification	9 - 11
D. When Presented with Dr. Jamison's Statement, Sacred Heart was Required to Restore Mr. Chaney	11 - 17
III. CONCLUSION	17

Washington Cases

Bender v. City of Seattle, 99 Wn.2d 582, 664 P.2d 492 (1983) 5

Chaney v. Providence Health Care, 165 Wn.2d 578,
267 P. 3d 544 (2011) 5, 7, 8

Federal Cases

Albert v. Runyon, 6 F. Supp.2d 57 (D. Mass. 1998) 9, 12 - 15

Bowen v. Georgetown University Hospital, 488 U.S. 204 (1988) 8

Brumbalough v. Camelot Care Centers, 427 F.3d 996 (6th Cir. 2005) .. 9 - 11

Cooper v. Olin Corp., 246 F.3d 1083 (8th Cir. 2001) 10

Harrell v. U. S. Post Office, 415 F.3d 700 (7th Cir. 2005) 9

Robbins v. Bureau of Nat. Affairs, Inc., 896 F. Supp. 21-22 (1995) 8

Routes v. Henderson, 58 F. Supp. 2d 959 (S.D. Ind. 1999) 13, 14, 16

Other Jurisdictions

Jordan v. Beltway Rail Co. of Chicago, 2009 WL 537053,
slip op. at 5 (N.D. Ill. March 4, 2009) 9

Mathews v. Fairview Health Servs., No. 01-2151, 2003
WL 1842471, at *1, 4 (D. Minn. 2003) 11

Underhill v. Willamina Lumber Co., No. 98-630-AS, 1999
WL 421596, at *7 (D. Or. 1999) 11

Federal Statutes

29 U.S.C. § 2613 (b) 10
29 U.S.C. § 2613 (c) 13
29 U.S.C. § 2614 (a)(1) 12
29 U.S.C. § 2614 (a)(3)(B) 13
29 U.S.C. § 2614 (a)(4) 9, 15, 17
29 U.S.C. § 2614 (d) 13
29 U.S.C. § 2654 8
42 U.S.C. § 12112 (d)(4) 14

Federal Regulations

29 C.F.R. 825.310 7, 15
29 C.F.R. 825.310 (a) 8
29 C.F.R. 825.310 (b) 8
29 C.F.R. 825.310 (c) (2007) 6, 8, 9, 10, 12, 16, 17
29 C.F.R. 825.312 6, 7
29 C.F.R. 825.312 (b) 8
29 C.F.R. 2613 (b) 10
49 C.F.R. 382.213 4

Rules

RAP 13.4 (b) (1) 5

RAP 13.4 (b) (3)6
RAP 13.4 (b) (4)6

I. STATEMENT OF THE CASE

Robert Chaney was employed as an interventional radiologic technologist with Providence Health Care, which does business as Sacred Heart Medical Center & Children's Hospital ("Sacred Heart"). (RP 425). Interventional radiology involves invasive medical procedures performed on a patient such as arteriograms. (RP 64-65; RP 186-87). An interventional radiology procedure is performed by a team of health care workers which includes a radiologist (the physician), two interventional radiologic technologists, an x-ray technologist, and a nurse. (CP 187).

During his employment, Mr. Chaney was required to take leave under the Family Medical Leave Act (FMLA) because of a serious health condition suffered by his wife. (RP 419-21). Mr. Chaney's absence from work caused concerns for his supervisors which were reflected in his personnel file. (Ex. P8, Bates Stamp (BS) No. 101039; Ex. P12, BS No. 102056; Ex. P20, BS# 101017; RP 57).

The relevant facts for Sacred Heart's Petition for Review begin on June 25, 2007. After putting in 12 hours involving two long procedures, Mr. Chaney was requested to take over for another interventional radiologist in a procedure called a three-dimensional spin. (RP 461-64). A nurse contacted Mr. Chaney's supervisor after he had gone to perform the procedure to report that she had concerns that Mr. Chaney was incoherent and having difficulty

speaking. (RP 505-06; RP 86). Mr. Chaney was required to undergo a drug test after he had finished the procedure. (RP 465; Ex. D127). Pursuant to policy, Mr. Chaney was suspended from work pending the results from the testing. (Ex. D134).

The drug test detected Methadone. Mr. Chaney explained that he had a prescription for the narcotic which was used to treat his chronic back pain. The drug test results were negative for illicit drug use. (RP 466; RP 234-41; Ex. BS No. 102012). After the drug test, Mr. Chaney was required by Sacred Heart to submit to a fitness-for-duty examination by Dr. Royce Van Gerpen on July 16, 2007. (RP 160, RP 467).

Before the fitness-for-duty examination, Mr. Chaney visited his doctor, Dr. Jeffrey Jamison. Dr. Jamison's office issued a letter on July 5, 2007, indicating that Mr. Chaney could safely perform his duties as an interventional/special procedures technologist. (Ex. P25). Dr. Jamison had worked in the settings of interventional radiology and was familiar with the duties of an interventional radiologic technician. (RP 238-39). Dr. Jamison had prescribed Methadone and other medications for Mr. Chaney, specifically to allow him to work in his position as an interventional radiologic technician. (RP 240-41).

At the fitness-for-duty examination, Mr. Chaney openly discussed the medications he had been prescribed because of his health condition. (Ex. P33; RP 362-63). Dr. Van Gerpen refused to release Mr. Chaney to return to

work as an interventional radiologic technician because of the medications. (Ex. P34). Dr. Van Gerpen issued this opinion without ever having observed an interventional radiologic technician participating in a procedure in interventional radiology. (RP 396).

In a letter dated July 31, 2007, Sacred Heart informed Mr. Chaney that Sacred Heart was unilaterally placing him on FMLA leave for his own health condition. (Ex. P36). The letter directed Mr. Chaney to complete the FMLA paperwork and to have Dr. Van Gerpen complete the medical certification portion. (Id.).

Dr. Van Gerpen refused to complete the medical certification. (Ex. P40). Dr. Van Gerpen correctly informed Sacred Heart that Mr. Chaney's physician was the appropriate health care provider to complete the certification. (Id.). When presented this information, Ms. Laurie Morse, the Director of Employee Relations for Sacred Heart, wrote:

Well that's great! This Dr. VanGerpen is the one who restricted his ability to work. I'll be surprised if his own MD will complete it because I don't believe he agrees with the restriction . . . oh, it just gets more complicated!

(Ex. P44).

Dr. Jamison completed the Certification of Health Care Provider. (Ex. P45). Mr. Chaney had indicated in the Request for Family Leave that his leave began July 16, 2007. (Ex. P46). Dr. Jamison, knowing that Sacred Heart had begun Chaney's FMLA leave on July 16, 2007, indicated that Mr.

Chaney only needed two to four weeks of continuous leave. (Ex. P45). Four weeks after Mr. Chaney's leave began, on August 10, 2007, Dr. Jamison indicated that Mr. Chaney could return to work "as soon as Employer allows." (Id.). Mr. Chaney, also, indicated that he could return to work immediately. (Ex. P46). No one on behalf of Sacred Heart ever contacted Dr. Jamison for clarification of Mr. Chaney's release to return to work. (RP 241; Ex. P49).

Because Sacred Heart refused to allow him to return to work, out of desperation, Mr. Chaney visited Dr. Van Gerpen on August 23, 2007. (Ex. P47). He explained to Dr. Van Gerpen that Sacred Heart would not even allow him to return to work as a routine x-ray tech because of his restriction from interventional radiologic work. (Id.). Dr. Van Gerpen would not change his opinion restricting Mr. Chaney from returning to work. (Ex. P47; Ex. P48). The basis for Dr. Van Gerpen's opinion was that, if a commercial driver was prevented from driving due to a prescription of Methadone, a hospital employee could not perform the duties of interventional radiologic technician if taking the medication. (Ex. P33; Ex. P47). Dr. Van Gerpen was actually incorrect regarding the restriction from commercial driving. See 49 C.F.R. § 382.213 (commercial driver may take a controlled substance, such as Methadone, if pursuant to the instructions of a licensed medical practitioner).

In a letter dated August 27, 2007, Sacred Heart gave notice to Mr.

Chaney that it was terminating his employment. (Ex. P49). Ms. Morse testified that Sacred Heart relied upon the opinion of Dr. Van Gerpen when terminating Mr. Chaney. (RP 215). Mr. Chaney's supervisor, confirms that his decision was based on Dr. Van Gerpen's opinion. (RP 299).

At the close of the evidence, the trial court denied Mr. Chaney's motion for a directed verdict against Sacred Heart for violation of the FMLA by not returning him to work after his doctor indicated he could return. (RP 523-25). The Court of Appeals, Division III, in a 3-0 opinion, has determined that the trial judge erred and that the case should be remanded for a trial on damages. Chaney v. Providence Health Care, 165 Wn. App. 578, 591-92, 267 P.3d 544 (2011).

II. ARGUMENT

A. Considerations for Petition

Through RAP 13.4 (b)(1), Sacred Heart requests review by contending that the Court of Appeal's decision conflicts with decisions of this Court concerning the treatment of motions for directed verdict. This Court has ruled that a directed verdict may be granted if, as a matter of law, no evidence or reasonable inferences from the evidence would sustain a verdict for the nonmoving party. Bender v. City of Seattle, 99 Wn.2d 582, 587, 664 P.2d 492 (1983). When considering the motion, the evidence must be viewed in the light most favorable to the nonmoving party. 99 Wn.2d at 587. As will be discussed below, there is no evidence or reasonable inference from the

evidence disputing that the statement provided by Mr. Chaney's doctor was a "simple statement" that Mr. Chaney could return to work. In the face of Dr. Jamison's clear statement, which satisfied 29 C.F.R. 825.310 (c)(2007), the verdict for Sacred Heart cannot be sustained.

Sacred Heart also requests review pursuant to RAP 13.4 (b)(3). That basis is not appropriate because this case does not present significant questions of law under the constitutions of the State of Washington or the United States.

Finally, Sacred Heart petitions for review on the basis that this matter involves an issue of substantial public interest. See RAP 13.4 (b)(4). The FMLA is an important piece of legislation promoting the interests of workers and their families. The Court of Appeals has properly ruled on the issue and has provided adequate guidance for future cases. Sacred Heart's petition should be denied.

B. The Law and Regulations Applicable

In its Petition for Review, Sacred Heart criticizes Division III for providing citations to later versions of the Code of Federal Regulations. (Pet. Rev. p. 5 n.1). However, it was Sacred Heart which aided the citation confusion. In its Brief of Respondent, Sacred Heart cited 29 C.F.R. § 825.312 as the regulation allowing an employer to require a certification that the employee is able to resume work. Sacred Heart cited the July 1, 2009, or later edition of the Department of Labor's regulations. In 2007, § 825.312

pertained to circumstances where an employer could refuse to provide FMLA leave or refuse to reinstate the employee. Sacred Heart utilizes this later edition of the regulations to argue that the employee has an explicit duty to cooperate with the employer. (See Respondent's Brief, pg 37). That language was not contained within the 2007 regulation.

The Court of Appeals' citation is to the current citation for the fitness-for-duty certification. See Chaney v. Providence Health Care, 165 Wn. App. 578, 587-88, 567 P.3d 544 (2011); 29 C.F.R. § 825.312. In July and August, 2007, the regulation requiring a fitness-for-duty certification was at 29 C.F.R. § 825.310. At that time, the relevant language of the regulation provided:

(a) As a condition of restoring an employee whose FMLA leave was occasioned by the employee's own serious health condition that made the employee unable to perform the employee's job, an employer may have a uniformly-applied policy or practice that requires all similarly-situated employees (i.e., same occupation, same serious health condition) who take leave for such conditions to obtain and present certification from the employee's health care provider that the employee is able to resume work.

* * *

(c) An employer may seek fitness-for-duty certification only with regard to the particular health condition that caused the employee's need for FMLA leave. The certification itself need only be a simple statement of an employee's ability to return to work. A health care provider employed by the employer may contact the employee's health care provider with the employee's permission, for purposes of clarification of the employee's

fitness to return to work. No additional information may be acquired, and clarification may be requested only for the serious health condition for which FMLA leave was taken. The employer may not delay the employee's return to work while contact with the health care provider is being made.

29 C.F.R. § 825.310 (a)-(c) (2007).¹ The regulations in effect during the summer of 2007 are the regulations to apply in this matter. Later revised regulations do not have retroactive effect. See Robbins v. Bureau of Nat. Affairs, Inc., 896 F. Supp. 18, 21-22 (1995)(“Regulations, like statutes, cannot be applied retroactively absent express direction to do so.”)(*citing Bowen v. Georgetown University Hospital*, 488 U.S. 204 (1988)).

The Court of Appeals clearly was considering the appropriate regulations (those in effect during July/August, 2007) but utilizing later citations. For example, the Court of Appeals cited 29 C.F.R. § 825.312 (b) for a fitness-for-duty certification to be “a simple statement that an employee is able to resume work.” Chaney, 165 Wn. App. at 589-90. This language is from 29 C.F.R. § 825.310 (c) (2007). The language is not present in 28 C.F.R. § 825.312 (b) (2011). All relevant case law cited by the Court of Appeals concerned the language found in 29 C.F.R. § 825.310 (c) (2007).

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Section 825.310 is actually from the July 1, 2006, edition of Chapter V, of Title 29. The 2006 edition of Chapter V was reprinted in Title 29 of the Code of Federal Regulations, published on July 1, 2007. The Secretary of Labor has been directed to prescribe regulations necessary to carry out the provisions of the FMLA. 29 U.S.C. § 2654.

See Brumbalough v. Camelot Care Centers, Inc., 427 F.3d 996, 1003 (6th Cir. 2005); Harrell v. U. S. Postal Service, 415 F.3d 700, 711, (7th Cir. 2005), *modified on reh'g on other grounds*, 445 F.3d 913, 920-21 (6th Cir. 2006); Albert v. Runyon, 6 F. Supp.2d 57, 62-63 (D. Mass. 1998).

C. Return to Work Certification

29 U.S.C. § 2614 (a)(4) provides that an employer may require an employee to obtain a certification from his health care provider that he is able to resume work. “The certification itself need only be a simple statement of an employee’s ability to return to work.” 29 C.F.R. § 825.310 (c) (2007).

The Sixth Circuit has commented regarding the lack of case law on what “a simple statement of an employee’s ability to return to work” requires. Brumbalough v. Camelot Care Centers, Inc., 427 F.3d 996, 1003 (6th Cir. 2005). “However, a plain reading of this regulation indicates that the fitness-for-duty certification need only state that the employee can return to work.” 427 F.3d at 1003; see also Jordan v. Beltway Rail Co. of Chicago, 2009 WL 537053, slip op. at 5 (N.D. Ill. March 4, 2009)(remarking that the Seventh Circuit has not clarified what is required for a “simple statement of an employee’s ability to return to work” perhaps because the plain meaning of the phrase requires no explanation). Although the employer can seek clarification, it cannot delay reinstatement while it is obtaining further information for clarification. 29 C.F.R. § 825.310 (c) (2007); Brumbalough, 427 F.3d at 1003-04. The Sixth Circuit compared the fitness for duty

certification to the more stringent requirements involved with the initial certification for FMLA leave. See 427 F.3d at 1004 (*Comparing* 29 U.S.C. § 2613(b)² with 29 C.F.R. § 825.310(c)). The lack of such detailed information required by the Act for the certification for an employee's return to work bolsters the view that the certification is just that—a simple statement that the employee can return. 427 F.3d at 1004; see also *Cooper v. Olin Corp.*, 246 F.3d 1083, 1090 (8th Cir. 2001)(recognizing the different requirements involved with the initial medical certification in comparison to fitness-for-duty certification).

In *Brumbalough*, the district court had granted the defendant summary judgment concluding that a doctor's note did not satisfy the requirements for a fitness-for-duty certification. 427 F.3d at 1003. The note stated that the plaintiff "may return to work on 8/13/01[.] She should only work a 40-45 hour work week and limit her out of town travel to 1 day per week." 427 F.3d at 1003. The Sixth Circuit held that the note was sufficient and "that once an employee submits a statement from her health care provider which indicates that she may return to work, the employer's duty to reinstate her has

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The Sixth Circuit referred to the required information for an initial medical certification under 29 U.S.C. § 2613 (b): "[S]tating that medical certification of a serious health problem will be 'sufficient' when it includes the date that the problems began, the probable duration of the ailment, all other appropriate medical facts regarding the condition, a statement that the employee is unable to perform work functions, as well as any requirements regarding "intermittent leave." 427 F.3d at 1004.

been triggered under the FMLA.” 427 F.3d at 1004.³

D. When Presented with Dr. Jamison’s Statement, Sacred Heart was Required to Restore Mr. Chaney

The Court of Appeals determined that Dr. Jamison’s statement constituted certification of Mr. Chaney’s fitness to return to work. Dr. Jamison’s statement was not diminished in legal effect because it was contained within Sacred Heart’s form entitled “Certification of Health Care Provider.” (Ex. P45).

In that form, Dr. Jamison certified that Mr. Chaney had a serious health condition. (Id.). He indicated that continuance leave of two to four

3

While considering what was sufficient for a fitness-for-duty certification, the Sixth Circuit considered two unpublished opinions and provided parenthetical explanations: “*Mathews v. Fairview Health Servs.*, No. 01-2151, 2003 WL 1842471, at *1, 4 (D. Minn. 2003)(finding that a return-to-work slip by a doctor which stated only that the employee could return to work and should not work more than 40 hours in a two-week period, was a sufficient fitness-for-duty certification which required immediate reinstatement); *Underhill v. Willamina Lumber Co.*, No. 98-630-AS, 1999 WL 421596, at *7 (D. Or. 1999)(finding that a letter from the employee’s doctor stating that the employee can return to work is specific enough to constitute a fitness-for-duty certification and require reinstatement ‘regardless of whether Defendant had concerns about plaintiff’s ability to do his job’).” Perhaps relevant to the case at bar which involves concern over the use of medication, in *Underhill*, the employer, a sawmill operator, was refusing to reinstate the employee because of its concerns with the plaintiff’s use of medication to control seizures. The employer expressed concerns to the plaintiff’s physician regarding the plaintiff’s behavior: “[I]nstances of confusion, inability to concentrate, dramatic mood swings, severe headaches, lethargy and weakness . . . ” while working “in an industrial setting involving sawmill processing equipment” *Underhill*, slip. op. at 2.

weeks was warranted. (Ex. P45, pg 2). Leave had begun on July 16, 2007. By the date that Dr. Jamison completed the certification, August 10, 2007, Mr. Chaney's serious health condition no longer prevented him from working. Dr. Jamison indicated that Mr. Chaney "is OK to work as soon as Employer allows." (Ex. P45, pg 3).

Under the FMLA, once an employee's health care provider provides a statement indicating that the employee is able to return to work, the employee must be restored to his position pursuant to 29 U.S.C. § 2614 (a)(1). Upon receipt of a statement indicating that an employee is able to return to work, the employer may take the following action:

A health care provider employed by the employer may contact the employee's health care provider with the employee's permission, for purposes of clarification of the employee's fitness to return to work. No additional information may be acquired, and clarification may be requested only for the serious health condition for which FMLA leave was taken.

29 C.F.R. § 825.310 (c) (2007). The employee's return to work cannot be delayed while the employer seeks clarification from the employee's health care provider. (Id.).

The employer with questions regarding the employee's ability to return to work may take advantage of the option to contact the employee's health care provider to seek clarification. Albert v. Runyon, 6 F. Supp.2d 57, 62-63 (D. Mass. 1998). The employer cannot force an employee to submit

to a further examination before allowing the employee to return to work. 6 F. Supp.2d at 63. When promulgating regulations, the Secretary of Labor refused to incorporate the process for obtaining second and third fitness-for-duty certifications for a returning employee as provided in the original certification for FMLA under 29 U.S.C. § 2613 (c) and (d). 6 F. Supp.2d at 63 n.3.

In Albert v. Runyon, the Postal Service sought a fitness-for-duty examination before allowing Ms. Albert's return to her position from FMLA leave. The district court considered the Postal Service's argument that the FMLA does not provide an employee returning from leave any rights or benefits beyond those to which she would have been entitled had she not taken leave. 6 F. Supp.2d at 65; see 29 U.S.C. § 2614 (a)(3)(B). The district court determined that "the proper determinative factor is whether an employer *would* have taken a given action absent an employee's FMLA leave." 6 F. Supp.2d at 65. It determined that the Postal Service could not order the fitness-for-duty examination prior to return from FMLA leave unless it could establish that it would have ordered the examination regardless whether the employee had taken the leave. 6 F. Supp.2d at 65. If an employee presents a medical certification adequate under the FMLA and the employer has no *present* reason to doubt the employee's fitness for duty, "the employer cannot rely on the employee's FMLA leave (or her prior medical condition) to justify such an examination." 6 F. Supp.2d at 66; see also Routes v.

Henderson, 58 F. Supp.2d 959, 998 (S.D. Ind. 1999)(unless medical certification regarding ability to work creates a question about employee's ability to work, employee is to be returned to work).⁴

The district court observed that the Postal Service could legitimately order a fitness-for-duty examination upon an employee's return from FMLA leave only if the employee's post-reinstatement behavior provided a reason for doing so. 6 F. Supp.2d at 66. The court elaborated:

Since it appears that the "erratic behavior" Albert allegedly engaged in prior to her leave was related to her depression and the medication she was taking, the Service may not rely on that behavior as reason for an examination at this time.

6 F. Supp.2d at 66.

The Postal Service argued that it was allowed to require a fitness-for-duty examination under the ADA. 6 F. Supp.2d at 67; see 42 U.S.C. § 12112 (d)(4) (allowing employers to require examinations that are "job-related" and "consistent with business necessity"). The Postal Service argued that, since examinations were permitted under the ADA, they were necessarily permissible under the FMLA. 6 Supp.2d at 68. The district court discussed the argument:

4

In Routes, the district court also recognized that a policy of the FMLA is to protect an employee's privacy by having the employer work through the employee's own health care provider. 58 F. Supp.2d at 993-94.

The Service's purported business justification for requiring the examination goes something like this: the erratic behavior Albert exhibited prior to her leave created a legitimate, job-related reason for concern, and the documentation she has submitted is inadequate to alleviate that concern or to allow us to evaluate her contention that she is fit to return to work. The most basic problem with this argument is that it depends on the alleged inadequacy of a certification sufficient for the FMLA purposes for which it was offered. This alleged justification amounts to a claim that even though an employee's FMLA certification does not indicate any continuing incapacity, and even though there is no present reason to doubt her abilities, the employer's need to determine whether the employee has recovered sufficiently to perform her job functions provides an adequate business reason for a fitness-for-duty examination. Such a "need" could be asserted in the case of *any* employee returning from FMLA leave. This reading would negate the provisions of 29 U.S.C. § 2614(a)(4) and 29 C.F.R. § 825.310 requiring an employer to reinstate an employee upon receipt of her health care provider's certification that she is fit for duty, without demanding additional information, much less an examination. The FMLA makes it the health care provider's responsibility, rather than the employer's, to evaluate an employee's health condition to determine if she is sufficiently recovered to return to work. Accordingly, an employer cannot claim that its inability to independently assess the employee's health justifies requiring an examination.

6 F. Supp.2d 68-69. The district court determined that the Postal Service violated the FMLA by failing to reinstate Ms. Albert once it received a certification from her health care provider that she was fit to return to work.

6 F. Supp.2d at 69.

Sacred Heart had placed Mr. Chaney on FMLA leave. (Ex. P36). The regulations for the Act controlled. Dr. Jamison provided a certification that Mr. Chaney's serious health condition had resolved and that he was able

to return to work. Once Dr. Jamison stated that Mr. Chaney was "OK to work," Sacred Heart was required by 29 C.F.R. § 825.310(c) (2007) to restore Mr. Chaney to his position. On August 10, 2007, the date Dr. Jamison provided the certification, Sacred Heart had no information authorized by the Act to doubt his statement. There was no evidence that Mr. Chaney was not able to resume his duties on August 10, 2007. Any instances of behavior which would have caused concern allegedly occurred before Mr. Chaney was placed on FMLA leave and almost two months prior to Dr. Jamison's statement. Any concern caused by Dr. Van Gerpen's restriction was resolved by Dr. Jamison's certification.

Upon receiving Dr. Jamison's statement, Sacred Heart had one option at its disposal. With the permission of Mr. Chaney, Sacred Heart could have had its health care provider contact Dr. Jamison and seek clarification of Mr. Chaney's fitness to return to work. Sacred Heart could not delay Mr. Chaney's return to work while it sought clarification. See 29 C.F.R. 825.310 (c) (2007). Under the FMLA, it was Dr. Jamison's call whether Mr. Chaney was able to return to work and resume his duties. See Routes v. Henderson, 58 F. Supp.2d at 998 (FMLA leaves it to the employee's health care provider, not the employer, to determine whether employee is sufficiently recovered to return to work). Sacred Heart never sought to contact Dr. Jamison.

There was no question that Sacred Heart understood that Dr. Jamison's opinion would be that Mr. Chaney was able to return to his duties.

(See Ex. P44). Although a “complication” for Ms. Morse and Sacred Heart, this was what the law provided. In the face of Dr. Jamison’s statement, the jury’s verdict cannot be sustained. As a matter of law, Sacred Heart violated the FMLA by refusing to restore Mr. Chaney to his position after Dr. Jamison stated he could return.

III. CONCLUSION

Upon Mr. Chaney’s motion for a directed verdict, the trial court judge considered the opposing opinions by the doctors:

[F]irst of all we have the opinion of Dr. Van Gerpen that Mr. Chaney is not – he is fit for duty as an X-ray technician, I guess, but not as an intervening radiologist, radiological technician. As a result of that, Mr. Chaney gets a certification from Dr. Jamison, his personal physician, that he is fit to go back to work as soon as the employer will allow, is how he puts it. Which is a bit ambiguous, but be that as it may he says he is fit to go to work. So we have this situation where we have Dr. Van Gerpen saying one thing, Dr. Jamison saying another.

(RP 524). Pursuant to the FMLA, Sacred Heart was bound by Dr. Jamison’s certification that Chaney was able to return to work. See 29 U.S.C. § 2614 (a)(4); 29 C.F.R. § 825.310 (c)(2007). The trial court erred by denying Mr. Chaney’s motion. Sacred Heart’s petition for review should be denied.

Respectfully submitted this 19th day of March, 2012.

LACY KANE, P.S.

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