"Your Workplace Is Our Work"®

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LEHR MIDDLEBROOKS & VREELAND, P.C.
LABOR & EMPLOYMENT LAW

Employment Law Bulletin

To Our Clients And Friends:

WAL-MART FORMS DIVERSITY PANEL AMID GROWING PRESSURE was the headline throughout the United States on Tuesday, April 25, 2006. The focus of Wal-Mart on diversity is an outcome of pressure from class action discrimination litigation, a national union organizing effort, and political pressure from state and local governmental authorities. This raises a broader question which employers should consider: what does "diversity" mean and is it "good business" to establish an ongoing diversity commitment? The following analysis regarding diversity was prepared by Jerome C. Rose of our firm. Prior to joining our firm, Jerry worked for approximately 28 years as a litigator for the Equal Employment Opportunity Commission, first as part of its national litigation center in Atlanta and then as its regional attorney supervising all EEOC litigation efforts in Alabama and Mississippi. **Jerry's premise regarding diversity is that diversity must add to the "bottom line" by enhancing the quality of goods, services or care the employer's workforce provides.** Employers may view diversity as the "right thing to do," however, for diversity to be embraced by all stakeholders, the outcome must be one to enhance the employer's overall business purpose.

Under Jerry's leadership, our firm counsels with employers regarding strategic approaches to diversity, from policy and strategy development to diversity training for managers and the workforce. If you are interested in learning more about this, please contact Jerry at (205) 323-9261. Jerry's diversity analysis follows, to be continued in the May issue of the Employment Law Bulletin:

In the March 15th, 2001 issue of the USA TODAY, a "Diversity Index," based on a scale of 0-100, showed the probability that, of any two people chosen at random in the United States, there was an almost 50% chance that one of them would be of

another race or ethnicity than Caucasian American. The index was intended to illustrate the dramatic change in the diversity of the American people which had occurred in the United States during the 20-year period between 1980 and 2001.

It is more than likely that that probability has increased during the last five years to some level over 50%. However, even if it remained at the 50% level, that would be reason enough to be concerned about the effects of diversity upon your business or firm. As one writer put it **"…corporations recognize that they are better served if they more closely represent the diversity of their customers."** This of course is only a generalization, but in fact there are many specific, bottom-line business benefits which can flow directly from an enlightened diversity program.

Accordingly, in this, and in the next issue of the *Employment Law Bulletin,* we will address the following issues or items pertaining to diversity:

1. Why diversity programs are more necessary than ever before;
2. Historical "Diversity" and "Affirmative Action" programs;
3. New concepts of what a diversity program should include; and
4. Basic steps that must be taken in order to implement a sound diversity program.

Why Diversity Programs Are More Necessary Than Ever Before.

Diversity programs are more necessary than ever before for a number of rather obvious reasons as follows:

- The United States has changed dramatically in terms of its ethnic proportions during the last twenty years and even more changes are forecast for the future. The U. S. Census Bureau projects that by the year 2050, the so-called minorities in this country will make up approximately 57% of the U.S. population. Recently, of course, the proliferation of undocumented, Hispanic immigrants has become the subject of political debate both at the state and federal levels. **Already the U.S. may have become the most religiously diverse country in the world.** According to the Harvard University Pluralism Project, there are now as many Muslims as Jews, more Buddhists than Episcopalians, and more Hindus than Disciples of Christ. **Some demographers have observed that this recent wave of immigrants, both legal and undocumented, is significantly different than the predominantly European immigrants of past years. The earlier immigrants sought to lose their ethnic identity and assimilate into the American mainstream, while the newer wave of immigrants tend to retain their own customs and languages and try to maintain a distinct identity in the American social structure. Thus, whether we acknowledge it or not, "diversity" is a demographic reality.**
- We live in a global economy. It is perhaps self-evident that we are living in a shrinking world in terms of social and business contacts with persons of other nations. Foreign trade and worldwide markets are absolutely necessary to our own economy. Because of satellite technology we can now communicate instantly by cellular phones or television with almost every nation on the earth. Such technology encourages and supports business transactions with businesses in virtually every corner of the earth. Thus, the need to value diversity for bottom-line, business purposes becomes imperative.
- Finally, its just good business. It is in step with the times. **It is not by accident that some of the most profitable U.S. corporations are also the most diverse in terms of employees and enjoy the widest worldwide trading connections.**

Historical "Diversity" and "Affirmative Action" programs

Historically, the distinctions between so-called "Diversity" and "Affirmative Action" programs were often blurred because they both appeared to have the same basic objectives, namely:

(1) To achieve a reasonably balanced workforce with respect to race, gender and ethnicity (usually based upon the availability of qualified applicants in the geographical area from which the firm or entity drew its workforce);
(2) To minimize workforce disputes and stimulate a harmonious work environment by inculcating racial, gender and ethnic sensitivity;
(3) To offset the effects of societal discrimination (usually a voluntary measure for public relations purposes); or
(4) To comply with state or federal anti-discrimination laws (often an involuntary measure as the result of enforcement proceedings by a state or federal law enforcement agency).

The principal means by which the objectives of historical diversity and affirmative action programs were achieved included: (a) voluntary hiring goals or timetables, or (b) involuntary hiring goals or timetables mandated by consent decrees or settlement agreements.

A New Concept of Diversity

The historical models of diversity and affirmative action programs often did not work because they were implemented for the "wrong" reasons. That is, wrong in the sense that they were not directly related to the mission or bottom line goals of the firm or corporate entity involved. Except for the voluntary programs which were implemented for "public relations" purposes, the implementation of a diversity or affirmative action program merely to comply with a state or federal regulation, or to satisfy a court order or settlement agreement, or even to prevent future claims of discrimination, is not directly related to the bottom-line service and/or financial goals of most firms. Thus, over a period of time such ill-founded, shallow programs are often only perfunctorily administered or half-heartedly adhered to until the next crisis.

That is why a new concept of "diversity" is emerging which takes into account the need for progress in terms of business growth and profitability in an increasingly diverse business world. Under the new concept, enlightened management will implement diversity programs as a part their strategic planning to enhance organizational growth, provide leadership stability and/or maximize profits.

While some of the old, historical concepts may be included in what may be called "Neo-diversity," such concepts are far too limited to describe what an enlightened diversity program ought to include. **Perhaps the best way to begin a discussion of this new concept of diversity" is to identify the kind of program it should not be:**

- First, it should not be a program under which an employer merely pledges to hire or promote on a non-discriminatory basis. That is already required by law, and calling it a diversity program is little more than "window dressing."
- Secondly, it should not be merely an affirmative action program imposed by some court order to correct systemic, in-house discrimination, or a self-imposed program to correct societal discrimination, as worthy as that may be.
- Thirdly, it should not be a program run primarily by the Human Resources Department to achieve racial, ethnic or gender balances in order to meet certain obligations under a governmental contract. (e.g. contracts controlled by Executive Order 11246).

- Finally, it should not be merely a program to enhance racial, ethnic, religious or gender sensitivity in order to create a pleasant work environment (although that is very desirable).

While there is no absolute definition, an enlightened concept of Diversity in our judgment should be based on the following principles:

(1) That sound corporate leadership is not (or at least should not be) inherited through some "good ole boy" promotional network or informal system, but must be cultivated and developed through deliberate, fair, objective training and mentoring of the brightest and best candidates regardless of race, sex or ethnicity.

(2) That sound corporate leadership can only be developed, enhanced or grown in an environment (or "corporate soil') that has been cultivated to respect the positive benefits of having persons of diverse backgrounds share in the decision making process.

(3) That "Diversity," like virtue should be its own reward. Having representation of various races, ethnic groups and both sexes in top management positions should be a matter of corporate culture, and that such representation, itself, sends an unspoken message to the workforce and the general public that each individual's competence is recognized regardless of race, sex or ethnicity.

Accordingly, at the very least, the objectives of this new concept of diversity should include the following:

- To maximize profits by ensuring that the best and brightest candidates with the greatest potential rise to positions of leadership in the firm or corporate entity regardless of race, sex or ethnicity.
- To encourage internal competition and growth by identifying employees with management potential and placing them on a developmental track for future corporate leadership regardless of race, sex or ethnicity.
- To develop a ready reserve of skilled, talented employees who would be able to step in, when needed and as needed, to maintain stability in the corporate structure regardless of race, sex or ethnicity.

Summary

In a nutshell, the old approach taken by many firms in implementing a diversity or affirmative action program was to leave it to the Human Resource Department to find a way to comply with all governmental regulations, court orders or consent decrees in hiring or promoting applicants or employees. Usually this approach did not produce the long-term benefits of having a diverse workforce because it was not tied to the strategic mission of the business entity. **Under the new concept of diversity, the whole program is an integral part of the strategic mission of the firm or corporate entity. It is directly related to bottom-line profits and takes into account the demographic fact that virtually all businesses are a part of a global economy and must operate in an increasingly diverse business world**.

STATE STATUTORY INITIATIVES: "FAIR SHARE" HEALTH CARE AND WORKPLACE GUN LEGISLATION

Approximately 30 states have introduced legislation generally called "fair share" health care, which focuses on the growing population of those in the workforce who are uninsured and on the continued increase in Medicaid expenses to the states. The common denominator among state legislative initiatives is to require

employers to either provide health care coverage for the workforce or pay into a state fund to accomplish the same thing. This is an issue that the AFL-CIO has latched onto as it has galvanized support at the state level to push for such legislation, characterizing unions as the "ally" of the worker and the worker's family for health care.

The typical state legislation covers an employer with a minimum threshold of employees; in New York it is 100 and in Maryland it is 10,000 ("the Wal-Mart legislation"). The Massachusetts bill would require employers not offering insurance to pay $295.00 per year per employee into a state fund, while the California bill would require employers of at least 10,000 employee to spend a minimum of 8% of their payroll cost on either company provided health benefits or contribute the same amount of money to the state program. Florida's bill would also apply to employers with 10,000 employees, and it would require a 9% contribution. Kentucky also proposes the 10,000 employee minimum and an 8% contribution. **Many states have based their legislation on Maryland's law, which thus far is the only state to have enacted such legislation. In Maryland, an employer with at least 10,000 employees must contribute at least 8% of its total payroll cost to employee health benefits.** Lawsuits have been filed over whether Maryland had the authority to enact such legislation. **What is the overall message to employers? As insurance costs become unsustainable and more employees lack basic health care coverage, there will a groundswell of support for legislation to mandate employer contribution to health care, just as the employer contributes to social security. If the business community does not address this on its own, we believe that Congress will.**

Three states (Indiana, Oklahoma, and Alaska) recently enacted legislation that prohibits an employer from terminating an employee who keeps a firearm in the employee's vehicle that is parked on company premises. Supported by the National Rifle Association, the legislation arose out of a circumstance where employees at a facility in Oklahoma were terminated after a random search discovered they had weapons in their vehicles on company property, contrary to company policy.

Unless limited by such legislation, employers have the right to determine whether employees may or may not have firearms, alcohol or anything else in their vehicles parked on company property, even if the property is leased or the parking facility is used by non-employees. We have been involved with counseling employers where employees brought weapons from their vehicles to a facility, in one case killing the employee's immediate supervisor.

CAN'T WORK ON SATURDAYS FOR RELIGIOUS PURPOSES? THEN YOU CAN'T WORK AT ALL

This was the outcome in the case of *Aron v. Quest Diagnostics, Inc.* (3d Cir., April 3, 2006). Quest was a clinical testing company in the health care industry and required its phlebotomists to work two Saturdays a month. Quest had a vacancy for a phlebotomist and Aron applied. However, Aron said that he could not work on Saturdays because of his religious beliefs and practices. Quest refused to hire Aron. Aron sued and lost. Quest's reason for not hiring and accommodating Aron's inability work on Saturdays is that it would result in other phlebotomists working more Saturdays, which would adversely affect employee morale. Quest also had "floating" phlebotomists, who visited its client locations. However, Quest concluded that Aron could not be considered for that position, because some clients need blood products on Saturdays. The court concluded that the company had a legitimate business reason for why it could not accommodate Aron, and Aron failed to show that the reason asserted by Quest was pretextual. Accordingly, Quest was permitted to continue to enforce its Saturday work requirement for all phlebotomists.

Note that one form of reasonable accommodation Quest could have considered would have been to offer Aron a position in another department for which he was qualified, where Saturday work was not required. In such a circumstance, if a position were offered, it would not have to be with the same pay and benefits it to be considered "reasonable accommodation" under Title VII. Remember that the reasonable accommodation requirement under Title VII is not nearly as onerous for an employer as under the Americans with Disabilities Act.

NO INDIVIDUAL LIABILITY UNDER TITLE VII FOR SEXUAL HARASSMENT, RULES COURT

In the case of Dearth v. Collins (11th Cir., March 6, 2006), the Eleventh Circuit Court of Appeals stated that **"we now expressly hold that relief under Title VII is available against only the employer and not against individual employees whose actions would constitute a violation of the Act regardless of whether the employer is a public company or a private company."** The case involved a claim of sexual harassment brought by Brandi Dearth against Richard Collins, who was the president, director and only stockholder of InfoPro Group, Inc. Dearth had worked for InfoPro for five months when she was terminated. She sued Collins in federal court under Title VII and also under state law for assault and battery, negligent supervision and intentional infliction of emotional distress. The district court dismissed all of her claims, stating that the behavior was not pervasive or hostile enough and there was no individual liability under Title VII. Previously, the Eleventh Circuit had ruled that there could be personal liability under Title VII in the public sector. In this case, it affirmed that the same principle applies to both the public and private sector.

Dearth was Collins' administrative aide. She claimed that he made repeated sexual suggestions to her and touched her sexually. The Eleventh Circuit disagreed with the trial court's ruling that the behavior was not pervasive or severe enough to constitute harassment; the Court of Appeals said that it was harassment. However, the Court of Appeals stated that the company exercised reasonable care to prevent harassment from occurring by issuing to all employees a comprehensive harassment policy and that Dearth **"unreasonably failed to take advantage of any preventative or corrective opportunities provided by InfoPro, or to otherwise avoid harm, by failing to notify anyone at InfoPro of Collins' alleged harassment. Indeed, Dearth did not make any claims of sexual harassment until she was advised of her termination. Once InfoPro was informed of the alleged sexual harassment, an investigation was immediately conducted by InfoPro's legal counsel."**

Our observation is that it is remarkable how, in some cases, employers avoid liability where there is egregious sexual harassment, because employers implemented proper, comprehensive sexual harassment policies and took prompt, remedial action when the employer became aware of the alleged harassment. Be sure to review your organization's fair employment practices and harassment policies annually, your organization's protocol for the dissemination of those policies, and how your organization will respond when it becomes aware of allegations of harassment.

EEOC ISSUES POLICY GUIDANCE ON RACE DISCRIMINATION MATTERS

The EEOC on April 19 issued a comprehensive guidance memo as part of its Compliance Manual regarding the investigation and analysis of race discrimination charges. Last year 35.5% of all charges filed (out of 75,400) alleged race discrimination. Employers may gain access to the EEOC's guidance at the Commission's website – www.eeoc.gov.

The EEOC guidance also addressed "color" discrimination. The Commission concludes that color discrimination "can occur between persons of different races or ethnicities, or even between persons of the same race or ethnicity." Color, according to the EEOC, includes shades of color. The guidance also suggests "best practices" for employers and addresses the employment practices where the EEOC believes race and color discrimination are most likely to occur.

OSHA TIP: OSHA AND PENALTIES

This article was prepared by John E. Hall, OSHA Consultant for the law firm of Lehr Middlebrooks & Vreeland, P.C. Prior to working with the firm, Mr. Hall was the Area Director, Occupational Safety and Health Administration and worked for 29 years with the Occupational Safety and Health Administration in training and compliance programs, investigations, enforcement actions and setting the agency's priorities. Mr. Hall can be reached at (205) 226-7129.

- **OSHA has a new boss. The new Assistant Secretary of Labor for the Occupational Safety and Health Administration is Edwin G. Foulke, Jr.** He assumed the duties of that position on April 3, 2006. Foulke served on the Occupational Safety and Health Review Commission from 1990 to 1995. This is the independent, three-member ajudicatory body that hears appeals arising from OSHA actions. He chaired the Commission from 1990 until 1994.

- **Soon many young workers will again join the work force for the summer season. As usual, this poses the challenge of ensuring that this group is protected from injuries and illnesses while working these jobs. Youthful workers, typically lacking work experience, are particularly vulnerable to injuries if not adequately supervised and trained.**

  While OSHA enforces no age requirements, compliance officers in their normal inspections, observe the presence and duties of younger workers. If it appears that a worker might be too young for the assigned duties, OSHA will refer this to the federal Wage and Hour Division or the appropriate state agency.

  OSHA's concern with the safety of young workers is underscored by extensive information provided in a teen-worker section on its website at www.osha.gov. The new assistant secretary also made his first public appearance for the agency to kick off "The Teen Summer Safety Campaign."

- As ordered by the U. S. Court of Appeals for the Third Circuit, OSHA has issued a new standard for workplace exposure to hexavalent chromium. These compounds are used in the chemical industry as ingredients and catalysts in pigments, metal plating and chemical synthesis. Exposure can lead to lung cancer, nasal septum ulcerations, skin ulcerations and allergic and irritant contact dermatitis.

The new standard lowers OSHA's permissible exposure limit to 5 micrograms per cubic meter of air as an 8-hour time weighted average.

Traffic accidents occurring on public roadways are not investigated by OSHA unless they involve a construction work zone. Employers are not required to report these accidents to OSHA even when fatalities or multiple hospitalizations occur. They must, however, be recorded on the injury and illness logs.

Although not through enforcement measures, OSHA has given considerable attention to the issue of driver safety. This may be expected since traffic accidents are the main cause of on-the-job deaths. About one quarter of the occupational fatalities in 2004 were the result of traffic accidents.

A National Institute of Occupational Safety and Health (NIOSH) analysis of data for 1990-1992 found, among other things, that 62% of the fatally injured in work related traffic crashes were not wearing any type of safety

restraint. Every state in the nation now has a mandatory seat belt use law. In spite of this, it is estimated that about 20% of us fail to buckle up.

An executive order requires federal employees to wear seat belts every time they travel on public business, as passengers or drivers. OSHA has joined with the National Highway Traffic Safety Administration in promoting the use of seat belts. Safety programs of all employers should address on-the-job driving safety and the program should specifically require the use of seat belts.

WAGE AND HOUR HIGHLIGHTS: SUMMER EMPLOYMENT OF MINORS

This article was prepared by Lyndel L. Erwin, Wage and Hour Consultant for the law firm of Lehr Middlebrooks & Vreeland, P.C. Mr. Erwin can be reached at (205) 323- 9272. Prior to working with Lehr Middlebrooks & Vreeland, P.C., Mr. Erwin was the Area Director for Alabama and Mississippi for the U. S. Department of Labor, Wage and Hour Division, and worked for 36 years with the Wage and Hour Division on enforcement issues concerning the Fair Labor Standards Act, Service Contract Act, Davis Bacon Act, Family and Medical Leave Act and Walsh-Healey Act.

As we approach summer, many employers are asked by a current employee to hire his or her child or to hire other minors. To do so will often help employee morale. However, employers must make sure the hiring of a minor does not run afoul of either state or federal Child Labor Laws. Illegal employment of minors can result in the U. S. Department of Labor assessing penalties of up to $11,000 per minor.

The child labor laws are designed to protect minors by restricting the types of jobs and the number of hours they may work. To make it easier on employers, several years ago the Alabama Legislature amended the state law to conform very closely to the federal statute.

Prohibited jobs

There are seventeen non-farm occupations, determined by the Secretary of Labor to be hazardous, that are out of bounds for teens below the age of 18. Those that are most likely to be a factor are:

- Driving a motor vehicle and being an outside helper on a motor vehicle
- Power-driven wood-working machines
- Meat packing or processing (includes power-driven meat slicing machines)
- Power-driven paper-products machines (includes trash compactors and paper bailers)
- Roofing operations
- Excavation operations

However, in recent years Congress has amended the FLSA to allow minors to perform certain duties that they previously could not do.

1. The prohibition related to the operation of motor vehicles has been relaxed to allow 17 year olds to operate a vehicle on public roads in limited circumstances.

2. The regulations related to the loading of scrap paper bailers and paper box compactors have been relaxed to allow 16 & 17 year olds to load (**but not operate or unload)** these machines.

Due to the strict limitations that are imposed and the expensive consequences of failing to comply with the rules, employers should obtain and review a copy of the regulations related to these items before allowing an employee under 18 to perform these duties.

Hours limitations

There are no limitations on the hours, under federal law, for youths 16 and 17 years old. However, the state of Alabama law prohibits minors under 18 from working past 10:00 p.m. on a night before a school day.

Youths 14 and 15 years old may work outside school hours in various non-manufacturing, non-mining, non-hazardous jobs (basically

limited to retail establishments and office work) up to:

- 3 hours on a school day
- 18 hours in a school week
- 8 hours on a non-school day
- 40 hours on a non-school week

Also, all work must be performed between the hours of 7 a.m. and 7 p.m., except from June 1 through Labor Day, when the minor may work until 9 p.m.

Further, many states require the employer to have a work permit on file for each employee under the age of 18. Although the federal law does not require a work permit, it does require the employer to have proof of the date of birth of all employees under the age of 19. A state issued work permit will meet the requirements of the federal law. Work permits can be obtained through the school system attended by the minor.

The Wage Hour Division of the U. S. Department of Labor administers the federal child labor laws while the state labor department administers the state statute. Employers should be aware that all reports of injury to minors filed under Workers Compensation are forwarded to both agencies. Consequently, if you have a minor who suffers an on the job injury you will most likely be contacted by either one or both agencies. If DOL finds the minor to have been employed contrary to the child labor law, they will assess a substantial penalty in virtually all cases. Thus, it is very important that the employer make sure that any minor employed is working in compliance with the child labor laws. If I can be of assistance in your review of your employment of minors do not hesitate to give me a call.

Two more states have increased their minimum wage. On October 1, 2006 Arkansas' minimum wage will increase to $6.25 per hour, and Maine's will increase to $6.75 with another increase to $7.00 on October 1, 2007. Presently six states have a minimum wage of at least $7.00 with three additional states scheduled to reach that level in 2007.

Employers should continue to be aware of the requirements of the Fair Labor Standards Act and the Family and Medical Leave Act. If I can be of assistance to you in determining your compliance with either of these statutes please give me a call.

DID YOU KNOW…

…that over 300 private care physicians in Syracuse, NY joined the Teamsters? The Teamsters plan to organize doctors throughout New York, with the target goal of 1,000. Why are doctors attracted to the union? They believe that the union will help reduce their practice overhead (such as health care costs for their employees) and that the Teamsters will be advocates for the doctors when negotiating with insurance companies and hospitals.

…that the union representing employees at the EEOC has called for the Commission to "pull the plug" on its outsourced call center? The union representing the EEOC employees is known as the National Council of EEOC Locals #216 of the American Federation of Government Employees. According to 91% of the EEOC employees surveyed by the union, the call center did not provide useful information to the EEOC employees and it resulted in EEOC employees needing more time to handle inquires that were processed through the call center rather than directly from individuals. In response to the union's claim, the EEOC said that it "has been pleased with the center's overall performance."

…that the time it takes an exempt employee to find a job is the shortest since 2001? This is according to a survey by the outplacement firm of Challenger Gray & Christmas. According to its survey of 3,000 job seeking "exempt" employees, it took a median of 2.7 months for

those jobs seekers to find work during the first quarter of 2006, the lowest since the first quarter of 2001. The longest median average since 1985 was four months during the third quarter of 2004. According to the company, "The labor market is starting to look more and more like the one we experienced in the late 1990's, when there was a significant expansion of our economy."

…that an employee who was involuntarily placed on medical leave still must provide the employer with information for FMLA purposes? *Willis v. Coca Cola Enterprises, Inc.* (5th Cir., March 31, 2006). The employer placed the employee on involuntary leave because of the employee's continued absences for various medical related reasons. However, at no time did the employee provide the employer with information for the employer to believe that the medical reasons were due to a "serious health condition." Accordingly, the employee's failure to return to work in a timely manner justified the employee's termination. According to the court, "we cannot assume that every time an employer chooses to place an individual on leave that the FMLA is triggered. The FMLA is implicated, as the statutory language indicates, when the employee has provided sufficient information to allow the employer to determine that the leave qualifies under the Act."

…that the employer knew enough about the employee's condition to know it was covered by the FMLA? *Lozano v. Kay Manufacturing Company* (N.D. IL, March 28, 2006). Contrary to the Willis case reviewed above, this case involved a situation where the employer was on notice that the employee was under a doctor's care for "major depression." The employee "undisputedly advised his supervisor and human resources representative of his ongoing psychiatric care." The employee also "spoke of his mental condition and it was because of his mental condition that his performance deteriorated." In rejecting the employer's Motion for Summary Judgment, the court said there was enough evidence to let a jury determine whether the employer was sufficiently on notice that the employee had a serious health condition under the FMLA and if so, whether the employer terminated the employee in violation of the FMLA.

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