



FMLA Claim Seeking Full Salary for “Light Duty” is Rejected

Under the FMLA,¹ is an employee on “light duty” who returns to work from a job-related injury entitled to the higher rate of pay she used to earn? The Seventh Circuit in *Hendricks* rejected that claim.²

Mrs. Hendricks sought recovery of the \$3.23 per hour pay differential between her wages as a utility driver (in her former position before her leave for her rotator cuff injury/surgery) and her wages while on light duty under her workers’ compensation program as an office worker.

While FMLA requires an employer to save an equivalent position for an employee on leave,³ if the employee is unable to perform the *essential functions of her job* upon her return from leave because of a physical or mental condition, she is not entitled to her prior position⁴ or the pay she earned prior to taking leave.⁵ The same goes for an employee unable to show she would have been able to perform her previous duties at the end of the statutory twelve-week FMLA leave period.⁶

Perhaps even more importantly, if the employee is unable to perform the essential duties of her previous job upon her return, the FMLA does not require the employer to provide a job that the employee *can perform*, let alone offer equal pay for a different position with fewer duties. That scenario begins to sound more like an accommodation which enters the realm of ADA law⁷ or rights allotted under state workers’ compensation law, not FMLA.

If a healthcare provider certifies an employee to return to “light duty” work, an employee may accept that light duty assignment under workers compensation law, or continue on unpaid FMLA leave.⁸

In Mrs. Hendricks’ case, she opted to perform the “light duty” work, and not undertake FMLA leave.⁹ And because she returned to work, but was unable to physically perform the duties of her prior position, she was not eligible to exercise her right to return to the same or equivalent job she occupied previously. Therefore, the employer was under no obligation to either give her job back or pay her benefits equivalent to her prior position.

“...if the employee is unable to perform the essential duties of her previous job upon her return, the FMLA does not require the employer to provide a job that the employee can perform, let alone offer equal pay for a different position with fewer duties.”



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It is no wonder many practitioners and commentators refer to this area of the law as the Bermuda Triangle (where Workers Compensation, Family Medical Leave Act, and the Americans with Disabilities Act intersect). While Ms. Hendricks chose not to seek relief under the ADA, it appears from the facts she wanted to eat her cake and have her accommodation too. These three statutes provide distinct rights in fact-specific situations and it is easy for the lines to blur.

At the heart of Ms. Hendricks' argument, she sought an *implied right* of "FMLA light duty," however the FMLA and its interpreting regulations do not provide such a right. The court rejected her argument,¹⁰ reasoning "light duty" is only mentioned in the regulations as a component of a workers' compensation program.¹¹ The regulations allow an employee to take "light duty" under workers' compensation, *or* continue with unpaid FMLA leave, but neither the two paths shall cross (at least under these facts).

Because Ms. Hendricks was unable to physically perform the functions and duties of her position that she had prior to her injury, she was not entitled to return to the same or equivalent position under the FMLA or receive the same pay. Although her expansive interpretation was rejected by this court,¹² there is currently a heightened interest in FMLA law and this may not always be the outcome. As evidenced by the Department of Labor's recent Report and proposed rules detailing questions and comments about FMLA compliance received from employees, employers, law firms and interest groups from across the nation,¹³ there are most certainly new developments to come.

CASE NOTES:

¹ Generally, FMLA covers employers who employ fifty or more employees for each working day of twenty or more calendar workweeks in the current or preceding calendar year. See 29 C.F.R. 825.104. Eligible employees generally include those who are: employed for at least twelve months; performed at least 1,250 hours of service in those twelve months; and employee suffers from a serious health condition, birth/ adoption of a child or the care of a newborn, or the need to care for a spouse, parent or child suffering from a serious health condition. See 29 C.F.R. 825.110; see also *Rutland v. Pepper*, 404 F.3d 921, 923 (5th Cir. 2005).

² See *Hendricks v. Compass Group, USA, Inc.*, 2007 WL 2230161 (7th Cir. Aug. 6, 2007). Mrs. Hendricks also sought this additional compensation under the collective bargaining agreement.

³ Most employees are entitled to this right, however, the FMLA specifically excludes "key" employees among the highest 10% salary; or if it is necessary to prevent substantial & grievous economic injury to the employer. See 29 C.F.R. §825.217.

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CASE NOTES (Continued):

⁴ See *Johnson v. Houston's Restaurant, Inc.*, 2006 WL 373549 (5th Cir. 2006) (final doctor's note allowed return to work on light duty only with restricted lifting requirement; lifting was essential to plaintiff's job duties).

⁵ See 29 C.F.R. § 825.214(b).

⁶ See *Oatman v. Fuji Photo Film USA, Inc.*, 54 Fed.Appx. 413 (5th Cir. 2002) (employee unable to return to position at expiration of FMLA leave; FMLA does not provide a right to reinstatement with "reasonable accommodation")

⁷ "If the employee has been on workers' compensation absence during which FMLA leave has been taken concurrently, and after 12 weeks of FMLA leave the employee is unable to return to work, the employee no longer has the protections of FMLA and must look to the workers' compensation statute or ADA for any relief or protections." 29 C.F.R. §825.216(d).

⁸ See 29 C.F.R. § 825.220(d). However, if the employee elects to continue on unpaid FMLA leave (and does not elect to perform "light duty" work), she may no longer be entitled to collect payment under her workers' compensation program.

⁹ The record was unclear as to whether she took FMLA leave at all (ie. if her benefits under workers' compensation ran concurrently with FMLA leave). See *Hendricks*, 2007 WL 2230161, at n.1.

¹⁰ See *Hendricks*, 2007 WL 2230161, at *2.

¹¹ See 29 C.F.R. §§ 825.220(d) and 825.702(d).

¹² The outcome may have been different if the employee was on "light duty" due to intermittent leave or foreseeable absences due to medical appointments as provided under the FMLA. See 29 U.S.C. 2612(b)(2); see also Family and Medical Leave Act Regulations: A Report on the Department of Labor's Request for Information; Proposed Rule, 72 Fed. Reg. 124, at *35606 (proposed June 28, 2007).

¹³ See generally Family and Medical Leave Act Regulations: A Report on the Department of Labor's Request for Information; Proposed Rule, 72 Fed. Reg. 124 (proposed June 28, 2007).

This article is not intended as legal advice to a specific problem or issue. If you have a question about employment law, please contact the Powers & Frost attorney with whom you work or Andrea Johnson, Partner, Head of Employment and Commercial Litigation Section.

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