

# When employee has difficult pregnancy, don't get creative with FMLA, ADA

Not everyone has an easy pregnancy, birth and recovery. Employers that refuse to recognize this reality and don't offer accommodations for unusual circumstances face potential liability under both the FMLA and the ADA.

What's more, HR professionals and supervisors may find themselves *personally* liable for mistakes they make along the way.

*Remind supervisors:  
They may be held personally  
liable for FMLA violations.*

**Recent case:** Kerry worked for the Center for Organ Recovery and Education (CORE) until she was fired when she couldn't return to work within a few weeks of an emergency caesarean section, ostensibly because her 12 weeks of unpaid FMLA leave had expired.

Kerry sued CORE and her direct supervisor over their treatment of her pregnancy.

The trouble began shortly after she announced she was pregnant, when she first began having complications. Her doctor almost immediately restricted how many hours per day she could work. He said Kerry could not safely work the 12-hour days her employer demanded.

When Kerry told her boss about the hour restriction, the supervisor called a meeting with several other supervisors. Collectively they decided to terminate Kerry and told her the news—while promising she could keep her job if she got her doctor to rescind the restriction.

The next day, Kerry's boss informed Kerry she could keep her job but had to immediately go on FMLA leave. She told Kerry that her request for a reasonable accommodation of a reduced work schedule would not be honored. Kerry then went out on FMLA leave, her job apparently intact.

The pregnancy continued to be a difficult one. Finally, Kerry underwent an emergency caesarean section. The premature infant died hours after birth.

A month later, when her FMLA leave was set to expire, Kerry again asked for a reasonable accommodation of an additional six weeks recovery time due to complications from the surgery and the trauma of losing the child. The supervisor instead fired her.

Kerry's lawsuit alleged interference with the right to FMLA leave by forcing her to take FMLA leave instead of making a reasonable accommodation. It also claimed ADA violations for failure to accommodate, as well as retaliation for asking for those accommodations in the first place. The lawsuit sought to hold the supervisor personally responsible.

The court said all claims could proceed to trial. First, it said that because the supervisor apparently had the power to hire and fire and ordered Kerry to take FMLA leave in lieu of termination, she could be liable for FMLA violations.

The court also noted that while pregnancy isn't normally a disability, severe complications might create a disability entitling the pregnant employee to reasonable accommodations such as reduced hours. Forcing Kerry onto FMLA leave instead of considering a schedule change may therefore have violated the ADA.

Plus, disabled employees may be entitled to additional leave after the expiration of other leave as a reasonable accommodation. That's especially true if all that's needed is a bit of extra time before resuming duties—exactly what Kerry had requested. (*Smith v. CORE, et al.*, No. 13-428, WD PA, 2013)

**Final note:** Need to persuade supervisors to pay attention during FMLA training sessions? Remind them of their potential personal liability.