

FMLA reveals poor performance? Discipline

Sometimes, it takes an absence to discover that an employee wasn't doing her job well. But some HR professionals and supervisors fear disciplining a worker if they discover the poor performance while she is on FMLA leave.

Go ahead and act. As long as you can reasonably say you would have taken the same action against another employee who wasn't on FMLA leave, it doesn't matter how you found out.

Recent case: Cynthia was a supervisor for a window covering manufacturer with responsibility for 55 employees, including evaluating their performance. When she took about three weeks of FMLA leave, several of those subordinates came forward and told management that Cynthia was frequently unavailable to them because she spent a lot of time surfing the web instead of supervising them.

Cynthia's supervisor checked her computer use and discovered that over a six-week period, she had spent almost 25 hours browsing the Internet for nonwork-related reasons. When Cynthia returned, he told her that had to change and put her on a performance improvement plan.

For about a year, her Internet use went down and her performance improved.

Then Cynthia's mother became ill and her fiancé broke off their engagement. Cynthia took more leave to cope. Again, while she was absent, her subordinates came forward. They said their reviews were overdue and that Cynthia was again spending much of her work time online.

Management investigated again and discovered what looked like extensive wedding planning taking place during work hours. They discovered that in the preceding two months, she had recorded more than 11,825 visits to nonwork-related websites. This included nearly 1,800 hits on three specific websites: macys.com, facebook.com, and menswearhouse.com. Cynthia was fired.

Then she sued, alleging interference with FMLA rights and retaliation.

But the court tossed out Cynthia's lawsuit. She couldn't show that anyone with similar Internet usage and failure to complete subordinate evaluations had been treated differently. (*Montoya v. Hunter Douglas Window Fashions*, No. 14-1491, 10th Cir., 2016)