

Discipline or termination after FMLA leave? Prepare to prove it wasn't retaliation

Typically, courts look at whether an employee has used FMLA leave in the past when considering whether his employer interfered with his FMLA rights more recently.

The reason: If the worker previously took leave with no adverse consequences—that is, came back to the same job with the same benefits and got no grief from his boss—then it's unlikely that his employer would retaliate following subsequent FMLA leaves, either.

On the other hand, if the worker has additional evidence to show possible interference or retaliation, the judge may not give much weight to past leave usage.

Recent case: Samuel and Dominic had both taken FMLA leave in the past with no problems. But then they took leave again. This time, their employer terminated them shortly after they returned. They got contradictory explanations for being let go. Both recounted what they described as hostility from management.

Their former employer argued that since nothing adverse had happened when the men took FMLA leave before, then their discharge couldn't have been motivated by animosity towards using FMLA.

But the court said other evidence could be considered, too. Past problem-free FMLA usage didn't insulate the employer from potential liability going forward.

Otherwise, employers could simply bide their time before punishing employees for taking FMLA leave. (*Padilla, et al., v. Yeshiva University*, 2nd Cir., 2017)

Final note: Terminating after FMLA leave? Be sure you can point to a good business reason.