

No slack for employees who take FMLA, then get caught breaking your rules

Two obvious truths that employees sometimes misunderstand:

1. Employees who take FMLA leave are not immune to discipline discovered while they are out on FMLA leave or after they return to work.
2. If an employee asks for a new assignment when she returns from FMLA leave, it's perfectly legal for the employer to grant that request. That in no way violates the FMLA. Just make sure you carefully document the request at the time she makes it.

Recent case: Karen worked as a professor of art at the University of Texas, where she began teaching in 2005. She received tenure a few years later.

Then, in 2012, she requested FMLA leave for the spring semester 2013 so she could take care of her ill father in Detroit. Her leave was quickly approved for the entire spring semester, and she was paid for the entire time, using her accrued leave.

In May 2013, she notified the university that her father had passed away—and that she was also undergoing breast cancer treatment in Detroit.

She requested permission to teach online classes full time during the fall 2013 semester so she could remain in Michigan for additional treatment and to support remaining family members following her father's death. In her email request, she noted that she had already taken the required qualifying training to allow her to teach online. The university approved her request to teach online for the full semester from Detroit.

Then, during the semester, complaints began streaming in from students. An investigation revealed that Karen sometimes wasn't present when course modules were being streamed. Students said their questions often went unanswered for weeks at a time. Sometimes, course modules were missing entirely.

Then the university learned that Karen had been teaching in-person art classes in Detroit at another college. She had not first sought permission from the University of Texas as required by its rules. It turned out she had been teaching in Detroit both during FMLA leave and during her online teaching semester.

The university penalized her by lowering her salary by 10% for the following year after she returned to Texas to teach live courses. She was also barred from teaching online for three years.

Karen sued, alleging retaliation for taking FMLA leave and interference with her FMLA right to reinstatement to the same position she held before taking leave.

The university asked the court to dismiss the case. It first argued that it had only assigned her to teach online courses because she had requested that assignment as an accommodation following FMLA leave. It told the court her email request for online teaching was evidence the university didn't choose to make her teach online.

The court agreed.

The court said employees who request a different shift, schedule or position on return can't allege they weren't returned to the same position in violation of the FMLA.

Second, the university argued that it did not retaliate against Karen for taking FMLA leave; it merely disciplined her for poor performance in her online course and for violating university rules against outside employment.

Again, the court agreed with the university and dismissed the case. Nothing in the FMLA prohibits legitimate discipline for actions occurring during or after FMLA leave. The court dismissed Karen's lawsuit. (*Sanders v. Rodriguez et al.*, SD TX, 2018)