

From the courtroom: What you can and can't do with FMLA

FMLA isn't just about maternity leave and medical concerns - but it does have its limitations. As employers can see in these recent court cases, it's important to document decisions and know what you can, and cannot do when it comes to the FMLA.

You CAN break the FMLA shield by documenting when you began considering discipline ...

Make sure you track exactly when you begin disciplinary action, especially when it comes to the FMLA.

Reason: It's not unusual for a worker facing an uncertain employment future to "check out" for a while on FMLA leave. Sometimes, she may even think taking FMLA leave will prevent serious discipline such as being terminated. She may believe the employer won't risk an FMLA retaliation lawsuit by firing her while she is on leave or right after coming back.

That strategy won't work if you can show the disciplinary process had already begun before she asked for FMLA leave.

Recent case: Lisa worked for the Franklin County Jail as a correctional officer. An inmate filed a complaint against her, alleging they had engaged in an inappropriate relationship. The county told Lisa it was launching an investigation. The next day, Lisa went out on FMLA leave for 30 days to deal with an alleged mental health issue.

The investigation into her interactions with the inmate continued. When she returned to work, the county interviewed her about the inmate's allegations. It concluded the investigation a few days later. Lisa was fired for unprofessional conduct based on her relationship with the inmate.

She sued, alleging she had been fired in retaliation for taking FMLA leave.

The court dismissed the case. It reasoned that the county had shown the investigation into Lisa's behavior began *before* she asked for and took FMLA leave. Therefore, she could not have been disciplined because of that request. (*Hatch v. Franklin County Jail, et al.*, 3rd Cir., 2018)

...But beware close timing between discipline and employee's request to take FMLA leave

Employees who ask for or take FMLA leave are protected from retaliation for doing so. However, they aren't protected from the consequences of workplace problems unrelated to the FMLA that lead to discipline.

But timing is everything. If you intend to discipline someone who is on or is about to go on FMLA leave, be sure everything about the disciplinary process looks legitimate and fair.

Recent case: Michele worked for a retailer and earned great reviews for several years. Then she asked for FMLA leave to have foot surgery. She was asked to postpone the surgery in order to attend a meeting on June 6. She did as requested.

At the meeting, she was fired for alleged poor leadership. Management outlined a long list of problems dating back months, which they said contributed to her termination.

Michele sued, alleging retaliation and interference with her right to FMLA leave.

The company told the court the discipline had already been in the works when she asked for leave. Therefore, Michele's termination wasn't connected to FMLA leave.

But the court said the circumstances and the timing were suspect. A jury will decide whether Michele's discipline was already in the works before her request or whether the disciplinary reasons were merely an excuse to prevent her from taking FMLA leave. (*Borton v. Lowe's*, SD TX, 2018)

You CAN'T use FMLA to create long weekends

Employees who meet the minimum service and medical requirements are entitled to intermittent FMLA leave. But what if they appear to be abusing their FMLA rights to gain favorable schedules, in the process creating staffing problems for the employer? You may be able to refuse such an intermittent leave request without violating the FMLA.

Recent case: Evan worked for the U.S. Department of Transportation as an air traffic controller in Fort Worth. After his son was born in November 2013, he began asking for sporadic time off so he "could bond with his son." Typically, he requested Friday afternoons off, and all day Saturday. By April 2014, Evan's supervisor began refusing his time-off requests because it was almost impossible to get coverage for those busy travel days.

That's when Evan put in a formal, written request for FMLA leave. After much discussion, Evan's request was denied. He got plenty of days off but didn't get blanket permission to take Friday afternoon and every Saturday off. He did eventually use up his full FMLA entitlement.

He sued, alleging FMLA violations. The Department of Transportation argued that some FMLA requests—such as this one, which wasn't necessitated by medical needs—must be balanced against operational needs and scheduling restrictions.

The court agreed and dismissed the case.

It noted that Evan had been able to take most of the time off he requested and therefore any violation of the FMLA would have been, at most, minimal. (*Seeley v. Chao*, ND TX, 2018)

Caution: This is not a case of intermittent leave for a serious medical condition, where treatment might only be available during a certain shift.

If Evan's child had needed dialysis every Friday, for example, the employer would have had to grant intermittent FMLA leave.

You CAN deny FMLA leave if you aren't given any notice

Employees have to let their employers know when they need FMLA leave. Although they don't have to specifically mention the FMLA, they do have to pass on enough information so the employer can reasonably understand that's what the employee is requesting.

Recent case: Michelle was fired for poor attendance after she left work without permission. She alleged that she had suddenly become ill. She had her father drop off a note the next day. By then, she had already been terminated.

She sued, alleging she had been denied FMLA leave. But the court said, under the circumstances, Michelle had ample opportunity to tell one of several supervisors why she was leaving before she did so. (*Stringfield v. Cosentino's Food Stores*, No. 18-1925, 8th Cir., 2018)