

# Firing after FMLA leave? Expect lawsuit

If an employee takes FMLA leave and can't return to work once she's used it up, some employers assume they can fire her. That might be legally defensible *if* she's not disabled and thus possibly entitled to extended leave as a reasonable accommodation.

But what if she has already returned to work and a few days later takes another day off? Firing her while referencing use of FMLA leave may trigger a retaliation lawsuit.

**Recent case:** Heather worked as a residential care attendant and certified nurse's aide. Due to a number of medical issues, including two surgeries, she took FMLA leave three times during 2015. Her last surgery was a hysterectomy. She returned to work on time after using up the last of her FMLA leave.

Then, a few days after returning, she experienced pain from the surgery and left work to see her doctor. He gave her a note that said "light duty until further notice." Heather gave the note to her supervisor. She didn't request more leave, just light duty.

Several days later, Heather got a letter from the employer, notifying her that her "FMLA leave had been exhausted" and that her employment was terminated.

She sued, alleging retaliation for taking FMLA leave.

As direct evidence, she introduced the letter, which didn't reference her missing work after returning or her request for light duty. The court said that since the letter only mentioned exhausting her FMLA leave, it might be evidence that she had been fired because she took FMLA leave. The court said her retaliation claim could move forward. (*Kintz v. SMNRC*, MD PA, 2018)

**Final note:** Since Heather returned to work before she was terminated, the letter should not have referenced her FMLA leave. Instead, it could have stated that she was terminated because she was absent without leave.

## **FMLA: Keep records of all absences, whether or not they were approved**

Sloppy attendance record-keeping can lead to lengthy and expensive litigation. Particular trouble awaits if you fire an employee for poor attendance around the time she requests or takes FMLA leave. That almost guarantees a lawsuit.

**Solution:** Keep careful track of every absence and immediately update your records whenever an employee misses work.

**Recent case:** Iyhana took a job as a 911 operator for the city of Houston in May 2017. She was a probationary employee for the first year. She began to earn leave after her six-month anniversary.

Houston's 911 call center has a strict attendance policy that requires employees to provide 24 hours' advance notice before using leave—if they have leave available. Employees are warned that they may be disciplined for not providing notice unless the time is FMLA-covered and they are unable to give the 24-hour notice.

In mid-November, Iyhana took time off without providing advance notice.

Then, in early February 2018, she sent an email to the agency's FMLA coordinator, explaining that her daughter was in the hospital and that she needed time off. The coordinator sent her an FMLA packet that day. A few days later, the coordinator signed a "Notice of Eligibility and Rights & Responsibilities" form and sent it off to Iyhana. She checked the box that stated Iyhana was eligible for FMLA leave.

Iyhana was off for almost two weeks before returning to work. The next day, the coordinator sent an FMLA disapproval notice, informing Iyhana that she hadn't really been eligible for FMLA leave after all because she had not worked 1,250 hours in the preceding year.

Ten days later, the call center fired Iyhana, telling her she was being terminated for unscheduled absences back in November.

Iyhana sued, alleging interference with her FMLA rights, even though she hadn't been eligible for FMLA leave at the time.

The city countered that her erroneous FMLA leave hadn't been counted against her. It said she had been fired for the earlier absences.

Iyhana argued that the city was using those earlier absences in November as an excuse to terminate her for requesting and using FMLA leave. She pointed to her apparent eligibility to take leave after six months of employment and directed the court's attention to her time slips, which did not mark the time off as unapproved or unauthorized at the time the absences occurred.

The court said Iyhana's case could go to trial. It viewed the lack of contemporaneous records showing unapproved leave as suspicious. Now a jury will get to decide whether the use of the absences months later was pretext for FMLA retaliation. (*Byrd v. City of Houston*, SD TX, 2019)

**Final note:** A jury will also decide whether Iyhana was eligible for FMLA leave because the employer erroneously told her she was, leading her to rely on that representation to her detriment.

Iyhana told the court that if she had known she was not eligible, she would have made arrangements during her daughter's illness so she could go to work as scheduled.

The 5th Circuit Court of Appeals has previously ruled that employees who can show they relied to their detriment on their employer's FMLA approval notice cannot be fired for taking leave.