

Employee fired for excessive absences after making need for FMLA leave known

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The Family and Medical Leave Act (FMLA) prohibits an employer from interfering with an employee's right to take medical leave. When pursuing such a claim, an employee need not allege the employer intended to deny the benefit, just that it was withheld. The employer's motives are irrelevant when determining whether interference occurred. Of course, the timing of when the need for leave is shared is critical. What happens if an employee is slow to provide an employer with any indication that she needs to take medical leave? Or, what happens when the worker waits until after the termination decision is communicated? The U.S. District Court for the District of Arizona recently addressed the question.

Setting the scene

A satellite company implemented a “point-based attendance policy” under which an employee who accumulated eight points in a 12-month period would be terminated. The policy didn’t award points for absences related to FMLA leave or disability-related accommodations.

Employees who were going to miss work or arrive late were required to contact the “attendance line.” Absences would be coded as late or tardy to calculate points under the policy. Employees who needed FMLA leave were required to request it directly from a supervisor or contact the “leaves team.” Contacting the attendance line wasn’t enough.

Points-based termination

A customer service representative (CSR) had 6.5 points under the policy when she began

experiencing back pain. She went to the doctor on her day off, at which time she was diagnosed with a urinary tract infection and treated. She was scheduled to work the next four days.

The next morning, the CSR was in too much pain to work. She called the attendance line. She worked her next two shifts, reporting she was “feeling better” but that “it was probably going to be my kidney.” The following day, she called the attendance line and communicated that her doctor had referred her to the hospital for more tests. Her new total was 8.5 points.

The CSR’s supervisor began the steps for termination. He determined there were no pending leave requests and decided to let her go.

During the termination meeting, the supervisor told the CSR she was being discharged under the attendance policy. In response, she referenced her recent health issues and said she possibly needed surgery. The supervisor thought the treatment potentially would have qualified her for the leave but proceeded with the firing because she had made no previous attempt to get her absences approved through FMLA certification.

FMLA interference

The CSR sued for FMLA interference. The company asked the court to enter judgment in its favor. The claim required the former employee to show:

- She was eligible for FMLA protection;
- The employer was covered by the Act;
- She was entitled to leave under the FMLA (i.e., suffered from a serious health condition);

- She provided sufficient notice of her need to take the leave; and
- The employer denied the benefits to which she was entitled under the Act.

At issue was whether the company denied the FMLA benefits after the CSR provided sufficient notice of her intent to take leave.

An employee must provide sufficient information for the employer to reasonably determine whether the FMLA may apply to the leave request, but she isn't required to expressly assert her rights under the Act. While calling in sick, without more, is insufficient, employers can't avoid liability through willful blindness.

In closing

The CSR provided sufficient notice she might need the FMLA's protections when she told the supervisor she had been sick and might need surgery. Because (1) the employer didn't take into consideration that her recent absences could be FMLA-related and (2) she accumulated points for the absences, she was denied FMLA benefits to which she was entitled.

Take note, the CSR's termination was based on attendance and directly related to her need for leave. Her circumstances were very different from discharges based on misconduct. You should be on alert when employees make the need for leave known during a discharge meeting, but the reason for the firing plays a role in whether to proceed with the process or reevaluate the decision.

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