

## Employee fired for violating policy advances FMLA interference claim

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*The Family and Medical Leave Act (FMLA) creates two substantive employee rights. First, an eligible employee may take up to 12 weeks of protected leave as needed. Second, the employee has the right to return to the same or equivalent job following the protected leave.*

*To protect those rights, the FMLA makes it unlawful for an employer to interfere with an employee's right to take medical leave. What happens if an employer believes it has discovered employee misconduct while the employee is on FMLA leave? Or, can an employer fire an employee while on leave based on perceived misconduct? When faced with this situation, employers should proceed with caution.*

### Setting the scene

Staci Martin worked for companies that provided services to clients with special needs, oftentimes working for multiple companies at a time. In 2021, Martin worked as a Day Time Activities (DTA) Coordinator for Arise, Inc., where she provided DTA, habilitation, and respite services to an adult client, whom we will call C.B. She also provided habilitation, respite, and attendant care services to C.B. through a competitor of Arise, which was known by Arise.

In late 2020, Martin notified her supervisor that she needed to take leave to care for her ill father. In the first six weeks of 2021, she took her 40 hours of Arizona protected paid sick leave to care for her father. Then, Martin notified Arise that she intended to take FMLA leave to care for her father. Her FMLA leave was granted from February 23 through May 1, 2021.

According to Arise, on March 3, it received notice from the Division of Developmental Disabilities (DDD), the Arizona contracted entity that funds respite services, that C.B. requested to move DTA hours from Arise to its competitor so that she could provide C.B. more care through this competitor. Based on this information, Arise fired Martin on March 5.

### FMLA interference

Martin sued Arise for, among other things, FMLA interference. Arise asked the court to enter judgment in its favor.

A claim of FMLA interference requires employees to establish that:

- They are eligible for FMLA protections.
- Their employer is covered by the FMLA.
- They are entitled to leave under the FMLA (i.e., suffer from a serious health condition).
- They provided sufficient notice of their need to take leave.
- Their employer denied them of the FMLA benefits to which they were entitled.

Once these elements are established, Arise must demonstrate that it had a legitimate reason to deny Martin's reinstatement.

While Arise was able to show it had a legitimate reason (i.e., its "honest and reasonable belief" that Martin violated her nonsolicitation agreement with Arise), Martin was able to set forth contradicting evidence. Based on the disputed facts, the court declined to issue judgment in favor of Arise. Barring settlement, the case will be determined following a jury trial.

### Takeaways

The jury is still out (pun intended) on whether Arise interfered with Martin's rights. This article highlights that employers should take additional steps in similar circumstances to avoid a similar claim. To start, a follow-up inquiry with DDD may have either resulted in Martin's retention or provided sufficient additional evidence for Arise to win at this juncture.

Martin also sued under the retaliation provision of the Arizona Fair Wages and Healthy Families Act, alleging that her termination was in retaliation for taking state-protected paid sick leave.

I mention this merely to highlight that employees are increasingly pursuing retaliation claims under this Act because of the harsh penalties imposed by the statute if retaliation is found.

While at the time of this printing, I am unaware of any state case providing guidance on this provision within the Act, it requires that the employer be able to rebut the presumption of retaliation if an employee took state-protected paid sick time within 90 days of the termination.

Seeing how this is likely to be the case, employers should be prepared with documentation to demonstrate a legitimate nonretaliatory reason for the termination that is unrelated to the use of paid sick time.

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