FMLA COURT CASES Employers Should Know About

WHITEPAPER

J. J. Keller® FMLA Manager

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For years, courts have ruled on a variety of issues related to the federal Family and Medical Leave Act (FMLA), from employee eligibility to return to work. In any given case, an employer took an action that resulted in a claim. Therefore, cases can be opportunities to learn from others' mistakes or successes, and can present an opportunity to ask yourself "what you would do?"

Here are a number of cases that can help illustrate what worked and what didn't for employers. See how you would fare.

EMPLOYEE ELIGIBILITY

Case

An employee, Jesse, worked part-time. At one point, he went to the emergency room because he felt dizzy. He was diagnosed with a urinary tract infection and vertigo but was released to work with no restrictions five days later. A few weeks later, however, he requested FMLA leave for vertigo.

Jesse's attendance had been less than stellar even before his vertigo. He had been absent 14 times recently, five of which included his infection and vertigo. That left nine unprotected absences. Previously, Jesse had also incurred a policy violation of failing to wear a seatbelt while operating a forklift, so he was already under scrutiny. Since his unexcused absences and the policy violation were within 12 months, he received a warning, and he had to provide a performance agreement or risk losing his job. He chose the former.

In the 12 months before leave was to begin, Jesse had worked only 1,136 hours.

You might want to become familiar with the federal Circuit Courts, where many FMLA cases are appealed. The following lists which states fall under which Circuit Court. Since rulings can vary between courts, it helps to know how courts where you have employees have ruled.

- ✓ **1st Circuit = ME, MA, NH, RI, PR**
- ✓ **2nd Circuit = CT, NY, VT**
- ✓ **3rd Circuit = PA, NJ, DE**
- ✓ **4th Circuit = MD, NC, SC, VA, WV**
- ✓ **5th Circuit = LA, MS, TX**
- ✓ **6th Circuit = KY, MI, OH, TN**
- ✓ **7th Circuit = IL, IN, WI**
- ✓ **8th Circuit = AR, IA, MN, MO, ND, NE, SD**
- ✓ **9th Circuit = AK, AZ, CA, HI, ID, MT, NV, OR, WA**
- ✓ **10th Circuit = CO, KS, NM, OK, UT, WY**
- ✓ **11th Circuit = AL, FL, GA**
- ✓ **District of Columbia**

Employees are eligible for FMLA leave if they:

- ✓ **Worked for your company for at least 12 months (need not be consecutive),**
- ✓ **Worked at least 1,250 hours in the 12 months before leave is to begin, and**
- ✓ **Work at a site with at least 50 company employees within 75 miles.**

WHAT WOULD YOU DO?

The employer in this case denied the leave because Jesse had not worked at least 1,250 hours before leave began, and terminated him. In response, he sued.

In court, Jesse argued that he was eligible for FMLA leave because he had been paid for 1,257.29 hours.

The court indicated that the FMLA does not define the term "hours of service," but refers to the federal Fair Labor Standards Act (FLSA). The FLSA, however, does not specifically define the term, either, but the court had in the past ruled that the term includes only those hours actually worked, but does not include unworked hours, even if paid for the unworked hours.

Jesse ended up agreeing that he did not actually spend all of the 1,257 hours working, as they included paid vacation and holidays. The court ruled for the employer.

The U.S. Department of Labor's Wage and Hour Division (WHD) has provided insight into this issue in an opinion letter from 1994:

"Nothing [in the applicable FLSA regulation] can be construed as requiring an employer to count as hours worked those times when the employee has been completely relieved from duty such as when the employee is on paid or unpaid leave."

Saulsberry v. Federal Express Corporation; 6th Circuit Court of Appeals, No. 13-5345, January 10, 2014.

TAKEAWAY:

This case illustrates that time off for vacation, holidays, sick leave, etc., need not be counted toward an employee's 1,250 eligibility criterion, even if the employee was paid for those hours. You need only include hours actually worked.

EMPLOYEE NOTICE OF THE NEED FOR LEAVE

Case

Kyle, a firefighter-paramedic worked a scheduled 24-hour shift after which he was told that he needed to work another 24-hour (overtime) shift. After being informed of the additional shift, Kyle told his boss, Harry, that he "couldn't do it anymore" and that he "would turn his stuff in if he needed to." So many shifts caused Blake to be burned out.

Harry wondered what Blake meant by his statements. Blake didn't explicitly say he was quitting, but, generally, when you turn your stuff in, you quit. After further discussion, Kyle did not retract his statement, but thought he was welcome to return to work and that something would be worked out, such as being transferred to a less-stressful position and being referred to the EAP for assistance.

When an employee seeks leave for the first time for a FMLA-qualifying reason, the employee need not expressly assert rights under the FMLA or even mention the FMLA.

WHAT WOULD YOU DO?

The employer in the case told Kyle that his verbal resignation was accepted.

Kyle sued, arguing that he hadn't resigned, he had asked for FMLA leave. The employer argued that Kyle never put it on notice of the need for leave.

The court agreed with the employer in this case, indicating that Kyle did not show that his burnout symptoms rendered him incapacitated, as required to give rise to a qualifying FMLA condition. It also agreed that Kyle never provided notice of the need for leave. Instead, his statements appeared to convey his intent to resign.

Blake v. City of Montgomery, 11th Circuit Court of Appeals, No. 20-14229, November 8, 2021.

TAKEAWAY:

The FMLA does not require employers to deduce unspoken (and even unthought) requests for FMLA leave. In this case, the employee didn't ask for leave at all. Not all situations are this clear cut, however. If you are unsure what an employee is asking for or saying, get clarification.

Case

Jake had worked for the company for a few years with no real issues. At one point Jake shared information regarding his father's deteriorating health with his supervisor and coworkers.

One day, Jake's stepmother told him that his father's health needed immediate medical attention. When he first began missing work, Jake had used voicemail to let his supervisor know about his absences. The day after learning about his father, he left a voicemail message with a company co-owner about his need for time off.

When Jake did not appear for his shift at the end of the week, the co-owner sent him a Facebook message asking where he was. Jake responded that his father was still pretty bad off.

WHAT WOULD YOU DO?

The co-owner in the case advised Jake to call his supervisor. Jake responded by sending several argumentative Facebook messages. The co-owner then messaged Jake "Don't worry about your job. You left," and "You abandoned your job according to everyone."

The argument continued until the co-owner told Jake not to return to the company property.

Jake sued, arguing that his employer violated his FMLA rights when it terminated him for availing himself of FMLA leave.

The employer argued that Jake's leave was not protected by the FMLA because he did not provide sufficient notice of his need for FMLA.

The court in this case ruled in favor of Jake. It pointed out that Jake informed both his supervisor and a company co-owner of his need for time off to care for his father, including when he indicated that his father was still pretty bad off. That was enough to put the employer on notice of the need for leave. The employer appeared to terminate Jake because he took such leave, which the court felt was retaliation in violation of the FMLA.

Waterman v. Paul G. White Interior Solutions, U.S. District court of Maine, No. 2:19-cv-00032, November 5, 2019.

TAKEAWAY:

Too often, employers make employees take excessive steps or use some specific words or even "apply" for FMLA leave. Employees only need to provide enough information to let employers know they need leave for a potential FMLA-qualifying reason, and missing work because a parent is "pretty bad off" can be enough. While you may require employees to complete leave applications as a part of the process, the process can be initiated with notices like Jake's.

EMPLOYER NOTICES

Case

Gabriel began having blood pressure issues at work. He informed his employer of the issue when it began and as things evolved. Early on, he was asked to provide an FMLA certification supporting his need for leave. The initial certification supported leave for the first half of the month, but he had a handful of related doctor appointments and trips to the emergency room that occurred throughout the entire month.

WHAT WOULD YOU DO?

In this case, the employer denied FMLA protections for the second half of the month.

Under the company's attendance policy if employees requested leave under the FMLA, they would collect attendance points while the request was under consideration by HR. Points were, however, removed once the FMLA leave was approved.

In its designation notice to Gabriel denying the leave, however, the company did not complete the spaces indicating what, if any, additional information was needed, and it did not indicate the dates of the denied leave or specify which time off requests were denied. In an accompanying letter, the company stated that the reason for the denial was only "does not meet criteria." That was supposedly the end of the conversation, as the employer did not ask for more information from Gabriel.

In any circumstance where the employer does not have sufficient information about the reason for an employee's use of leave, the employer should inquire further of the employee or the spokesperson to ascertain whether leave is potentially FMLA-qualifying.

The company received an updated certification at the end of the month. On the same date, the employer fired Gabriel for exceeding attendance points.

Gabriel sued, arguing that he was assessed attendance points for leave that was FMLA protected. The employer argued that at least a few of those days were not protected because of certification issues (yet it assessed points throughout the entire month). The employer indicated that it was entitled to a certification before approving the leave request and Gabriel had not provided complete and sufficient certification for all the leave he took before he had collected too many points.

In finding against the employer, the court pointed out that one of the errors was that the employer failed to specify, in the designation notice, any deficiencies it saw in Gabriel's certification. It never provided Gabriel with reasons for the denial nor stated what missing information it needed to approve the leave. It did not specify what criteria were not met or how Gabriel could have met the criteria.

Such failure, followed by a denial of FMLA leave and resulting termination of employment amounted to interfering with Gabriel's protected FMLA rights, and Gabriel won summary judgment on his FMLA interference claim.

Gonzalez v. JBS Live Pork, LLC, (C.D. Ill.), No. 18-cv-03044, February 7, 2022.

TAKEAWAY:

Don't leave applicable entries on the designation notice empty. If an employee's certification is incomplete and/or insufficient (including additional leave dates), you are also obligated to tell the employee what, specifically, is needed to fix it. This must be in writing. Simply indicating that it "does not meet criteria" is not enough, as this employer learned.

CALL-IN PROCEDURES

Case

In June 2019, Kasey, an employee, underwent an emergency appendectomy. While at the hospital, Kasey sent his group leader, Gary, a Facebook (FB) message notifying him of the situation. Kasey and Gary had used FB in the past regarding absences. As before, Gary and Kasey corresponded on FB over several days after Kasey's appendectomy surgery, as well as complications that subsequently set in.

Gary reported Kasey's absence to human resources, but didn't mention Kasey's hospitalizations.

Per company policy, employees were to notify their leader of an absence or being late via a call-in line at least 30 minutes before their shift began. If an employee missed three consecutive shifts without calling in appropriately, the company considered the employee to have abandoned the job and terminated.

WHAT WOULD YOU DO?

The HR director terminated Kasey for job abandonment, as he did not use the call-in line to report absences.

When Kasey returned to work on September 3rd, he learned of the termination, and he sued.

Part of the case revolved around whether Kasey's use of FB Messenger followed the employer's usual and customary call-in policy. Kasey argued that it did because that's how he had provided notice in the past, and his boss accepted it.

The company countered that, because Kasey didn't use the company's call-in line for reporting absences, his FMLA claim failed, despite his history of communicating with Gary over FB.

The court found that the FMLA's provision regarding "usual and customary" notice policies and procedures include any method that an employer has, by informal practice or course of dealing with the employee,

Under the FMLA, employers may require employees to follow their usual and customer policy and procedure for notifying of an absence.

regularly accepted, in addition with those in the employer's written attendance policy. Because Gary had accepted Kasey's FB messages to provide notice, that method became acceptable. Nothing in the FMLA limits the reach of "usual and customary" to a company's written policy.

Roberts v. Gestamp West Virginia, LLC, 4th Circuit Court of Appeals, No. 20-2202, August 15, 2022.

TAKEAWAY:

Even if you have call-in policies and procedures, if employees are allowed to use other, informal methods, those methods can be seen as acceptable. If you want employees to stick to your call-in policies and procedures, don't allow other methods, and train your managers and supervisors on this.

FMLA INTERFERENCE

Case

After 37 years of service, during which he periodically took FMLA leave, Salvatore contacted Wilma, the company leave administrator, to talk again about taking more leave. That particular year, 2016, he was being treated for PTSD and had used almost all of his 12 weeks of FMLA leave by September. The company was not happy about the amount of leave Salvatore had taken.

WHAT WOULD YOU DO?

Wilma responded to Salvatore request by indicating that he'd "...taken serious amounts of FMLA...don't take any more FMLA. If you do so you will be disciplined." Wilma did not explain what discipline would be involved, but Salvatore inferred that he would be fired. Instead, he retired. He did not take leave and he was not disciplined, but he did sue.

Salvatore claimed that the employer interfered with his FMLA rights because he was discouraged from taking FMLA leave to which he was entitled, and that he was retaliated against because he was constructively discharged.

The employer argued that it never denied Salvatore any FMLA leave, so it did not violate the FMLA.

The court indicated that an FMLA violation does not require actual denial of FMLA benefits; that it is unlawful to "interfere with, restrain, or deny" an eligible employee's exercise or attempt to exercise FMLA rights. Employers need not actually deny FMLA rights to meet the law's provisions.

The court pointed out that the law protects "the attempt to exercise" FMLA rights, which would make little sense if actual denial were required. If, for example, an employer has a burdensome approval process or discourages employees from requesting FMLA leave, the employer could interfere with and restrain access without denying many requests, because few requests requiring a formal decision would ever be made.

Not providing the required FMLA information, or verbally discouraging FMLA use before employees actually requested leave could also be interference. Threatening to discipline an employee for seeking or using FMLA leave to which he is entitled clearly qualifies as interference with FMLA rights.

Ziccarelli v. Thomas J. Dart, et al., 7th Circuit Court of Appeals, No. 19-3435, June 1, 2022.

TAKEAWAY:

Don't take actions that discourage employees from taking FMLA leave. Train your managers and supervisors on this, too.

Case

Ena, an employee, had a high-risk pregnancy, and she presented a doctor's note to her company restricting some of her duties, which otherwise included janitorial tasks. The employer accommodated the restrictions. Thereafter, however, Ena began experiencing more health issues and, as a result, her doctor shortened her work schedule from 30 hours per week to 20 hours per week.

When Ena provided another doctor's note regarding the shortened hours, her supervisor, a manager, and an HR representative met to discuss her employment.

Editor's note

Perhaps the employer was a little confused about the differences between the FMLA and the Americans with Disabilities Act (ADA). While the ADA does include an undue hardship defense, the FMLA does not. Under the ADA, you need not provide an accommodation that would pose a significant difficulty or expense based on the resources and circumstances of your particular organization in relationship to the cost or difficulty of providing that specific accommodation. Under the FMLA, however, an employer can't simply argue that accommodating an employee's leave would be an undue hardship. FMLA leave is an employee entitlement, so even if the leave does complicate things, or even makes them difficult, the employee still has a right to the leave.

WHAT WOULD YOU DO?

At some point in the discussion, they decided to terminate Ena. They felt that, while she was getting by with the initial restrictions, her new reduction in hours precluded her from completing the essential functions of her job.

Ena sued, arguing that the employer violated her FMLA rights. The employer argued that they were unable to accommodate the work restrictions provided by Ena's doctor. It also argued that Ena was terminated because she could not perform the essential functions of her job.

The court found that the employer's decision to fire Ena was directly connected to her request for a reduction in hours, which was protected under the FMLA.

Wages v. Stuart Management Corporation, dba StuartCo, 8th Circuit Court of Appeals, No. 14-2793, August 10, 2015.

TAKEAWAY:

One of the cornerstones of the FMLA is that employees are entitled to job-protected leave for qualifying reasons. Even if an employee presents with limitations restricting working hours, the hours not worked would be FMLA-protected leave; the employer should not simply try to argue that it cannot accommodate the restrictions.

CERTIFICATION

Case

Deborah requested leave two days per week for about a month. The reason was related to symptoms for which the cause was unknown at that time. The employer asked for and received a certification.

The employer, however, denied Deborah's FMLA leave request because, it felt, the condition did not qualify as a serious health condition. Based on the certification, the condition didn't appear to be a chronic condition because the leave was required for only one month. It also failed to specify whether the probable duration of one month referred to the duration of the leave request, the duration of the medical condition, or both.

WHAT WOULD YOU DO?

Because her absences were unexcused, Deborah was terminated. She was soon thereafter diagnosed with diabetes and high blood pressure.

Deborah sued, arguing that the employer "improperly denied her request for leave without providing her an opportunity to cure her medical certification." She felt the certification was insufficient, rather than indicating that she didn't have a serious health condition. She argued that the employer should have identified deficiencies in the certification and provided her an opportunity to cure it. Had the employer requested that her physician provide more information, she would have been in a position to provide the required information.

The employer argued that, since the certification showed that Deborah was not entitled to leave at the time it was received, the employer was not required to allow Deborah a cure period.

The court ruled in favor of Deborah. It opined that the certification was insufficient because it was vague, ambiguous, or non-responsive, entitling Deborah to a cure period.

The certification didn't include enough information to determine whether Deborah had a serious health condition. Therefore, it didn't disqualify Deborah from FMLA entitlement. A sufficient certification for intermittent leave must address both the expected duration of the intermittent leave and the probable duration of the condition. The last piece was missing, so the certification was incomplete and/or insufficient.

The court concluded that employers must advise their employees of deficiencies in their certifications and provide them with an opportunity to cure. The employer ignored these requirements and, instead, terminated Deborah.

When it comes to conditions that are not yet diagnosed, an employee's physician may need some additional time to provide the required elements of a sufficient certification, including more specific information regarding relevant medical facts and the probable duration of the condition, the planned medical treatment, and intermittent leave. As this case illustrates, the difference between a medical certification that supports leave and one that is deficient might be a matter of days.

Nothing in the statute or implementing regulations prevents the cure period from functioning as a grace period for an employee to obtain such information; on the contrary, they compel it, according to the court.

Hansler v. Lehigh Valley Hospital Network, 3rd Circuit Court of Appeals, No. 14-1772, June 22, 2015.

TAKEAWAY:

Receipt of an insufficient or incomplete certification triggers a regulatory obligation on employers to allow employees to provide more information; this obligation is unrelated to an employer's understanding of the employee's health condition.

RECERTIFICATION

Case

Brandon worked for the company since July 2016. He suffered from depression and anxiety and, in 2017, took 10 continuous days of FMLA leave. He also needed subsequent intermittent leave, lasting four to five days per episode, once or twice every one to two months.

Things were going fine until the period between February 12 and March 5, 2018, when Brandon called in every morning. When he returned, he met with HR and provided a doctor's note as his medications were being adjusted. This long, continual leave was different from what the certification indicated regarding intermittent leave.

Brandon asked that this last leave be extended until March 9 and was told to provide a recertification, given the seemingly changed circumstances. He subsequently missed work from March 7 to March 14 but stopped calling in after March 14. Under the company policy, three consecutive days absent without notifying the company was considered job abandonment. Brandon also failed to provide the requested recertification by the deadline of March 21.

Employers may request recertification every 30 days in relation to an absence, or when the minimum duration of the condition expires, whichever is later. In all cases, employers may request recertification six months after the initial certification. Employers need not wait the 30 days, minimum duration, or six months in certain situations.

WHAT WOULD YOU DO?

Given all this, Brandon was terminated on March 23. The employer told Brandon that the termination was due to his failure to both return from leave when expected and to communicate with the company regarding his absence.

Brandon sued, arguing that the company interfered with his FMLA rights by requiring recertification in March 2018.

The court indicated that, even though the March 2018 recertification request came before the minimum duration of Brandon's condition expired and before the six-month minimum for recertification, there was an apparent significant change in circumstances with Brandon's absences. Therefore, the employer had the right to request the recertification.

The employer supported its argument by pointing out that Brandon's 16-day leave was very different than the intermittent four-to-five-day increments indicated in the certification.

Brandon tried to counter that the 16-day leave was not significant, because this was less than twice the maximum amount of leave anticipated in a one-month period.

The court didn't buy Brandon's argument and ruled in favor of the employer.

Whittington v. Tyson Foods, Inc, 8th Circuit Court of Appeals, No. 20-3518, December 29, 2021.

TAKEAWAY:

Employers have the right to request recertification when called for, and a significant change in circumstances is one of those times when it is called for. In this case, the employee failed to provide the recertification and lost his FMLA protections. Therefore, neither the recertification request nor the termination violated the FMLA.

OVERTIME

Case

Sam suffered from cluster headaches. He asked to work no more than eight hours per day as working longer could trigger headaches, for which he took FMLA leave. But working overtime was an essential function of Sam's job.

WHAT WOULD YOU DO?

The employer told Sam that if he could not work overtime, he would need to resign or seek disability retirement.

In response, Sam sued.

The employer argued that the FMLA did not allow employees to take leave such that they could be relieved of ever having to work overtime. The employer also argued that Sam should use FMLA leave only when he was actually incapacitated by his headaches, not to avoid the possibility of triggering a headache.

The court, however, disagreed with the employer. It indicated that employees may use their yearly allotment of 12 weeks of FMLA leave to significantly alter their schedules. Intermittent or reduced schedule leave may ultimately convert a full-time position into a part-time one. Nothing in the FMLA restricted Sam from using his FMLA entitlement to essentially eliminate overtime.

The court also pointed out that, for chronic conditions, the regulations specifically offer an example of taking FMLA leave for asthma when an employee's doctor advises the employee to stay home when the pollen count is high, thereby avoiding an asthma attack. Therefore, employees may take FMLA leave to avoid impairment, particularly for chronic conditions.

Santiago v. Department of Transportation, et al., U.S. District Court, District of Connecticut, Civil No. 3:12cv132 (JBA), September 25, 2014.

TAKEAWAY:

Employees may take FMLA leave in a way that they are not required to work overtime. In such situations, you might want to ensure the certification supports such need for leave.

LEAVE ABUSE

Case

On June 16, 2017, an employer issued furlough notices to employees at one of its facilities. Over the next few weeks, 67 employees asked to take medical leave based by submitting certifications for minor soft-tissue injuries sustained while off duty.

While the high number of leave requests alone was unusual, the certifications added to the issue, as:

They were:

- similar or identical in content;
- They were all were signed by one of two chiropractors (one chiropractor provided 14 in one day);
- They all indicated that the employees suffered from minor musculoskeletal conditions such as sprains or muscle spasms;
- All but one stated that the employees sustained the injuries while off duty;
- All forms described generalized medical conditions and included no individualized assessment; and
- All called for leave of eight weeks or more.

Under the company's benefit plans, furloughed employees on medical leave, receive health and welfare benefits for up to two years. Otherwise, furloughed employees would receive such benefits for only four months.

WHAT WOULD YOU DO?

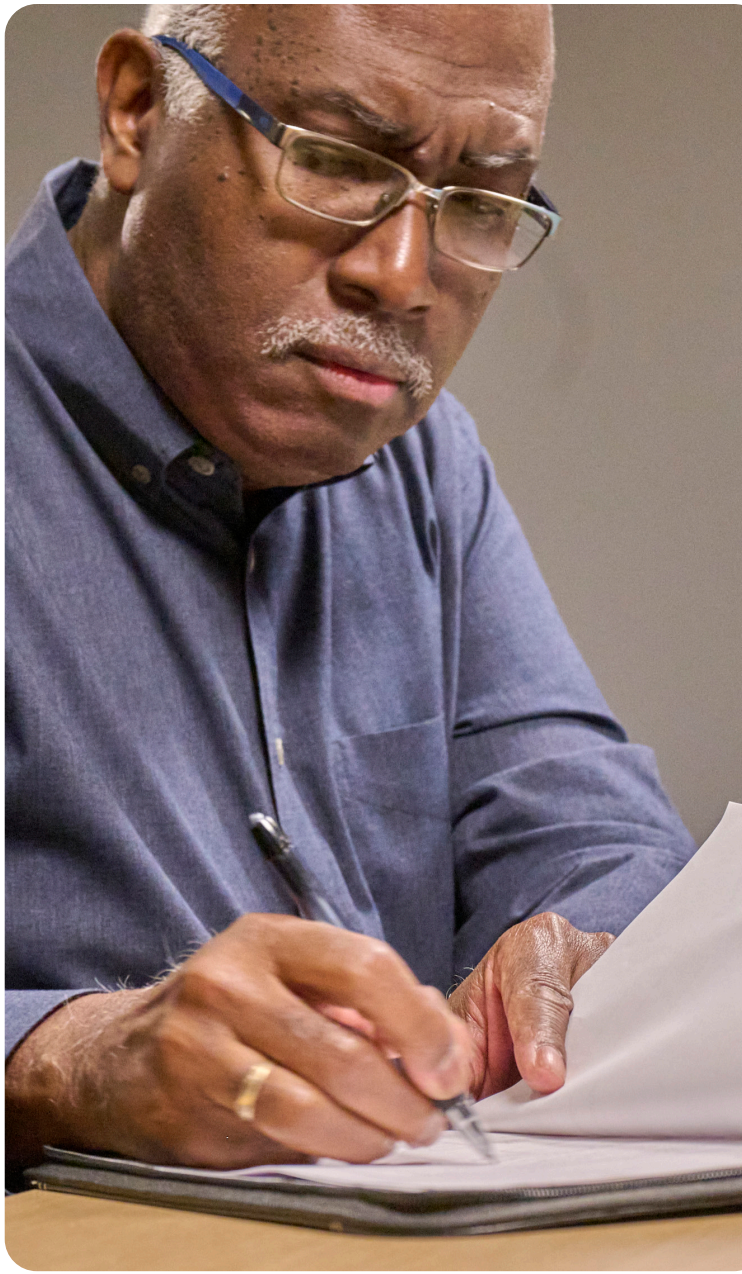
Suspecting benefits fraud, the company charged the employees with violating its workplace rule against dishonesty. While the disciplinary process played out, the employees were able to take the leave, their benefits continued, and their jobs were protected. Following the hearings, however, the employer terminated the employees.

In response, 58 employees filed a suit against the employer, alleging FMLA interference and retaliation.

The district court found in favor of the employer, indicating that the employer had provided a consistent and legitimate, nondiscriminatory reason for terminating the plaintiffs based on its belief that the employees were seeking time off work on an illegitimate basis.

The employees appealed, but the Appeals Court agreed with the district court.

Adkins v. CXS Transportation, Incorporated, Fourth Circuit Court of Appeals, No. 21-2051, June 16, 2023.



TAKEAWAY:

Employers do not interfere with an employee's FMLA rights when they terminate employees based on the honest belief that the employees are not taking FMLA leave for an approved purpose, regardless of whether such belief is correct.

SUMMARY

While administering FMLA leave will always pose challenges, the courts can lend a bit of insight into some of the finer points that can trip up employers. The devil is often in the details regarding FMLA-related issues and the variations of those issues are limitless. Therefore, we continue to learn from others; what worked, what didn't. The courts don't have all the answers, but provide plenty of guidance.

Too often, employers can't find an answer to a perplexing question, act as they feel appropriate, and end up learning whether their action was acceptable in the courts. Even if they learn the action was appropriate, resources are spent. The FMLA tries to strike a balance between the needs of both employers and employees, but that balance is often hard to find.

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