

Labor and Employment Client Service Group

To: Our Clients and Friends

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FMLA Cases From 2014: Upholding Employers' Policy Enforcement

The specter of interference and retaliation claims under the Family and Medical Leave Act ("FMLA") leads many employers to be wary of taking adverse employment action against FMLA-protected employees. Several recent FMLA decisions from courts across the country have reiterated employers' right to enforce legitimate, non-discriminatory policies.

In *Dalpiaz v. Carbon County*, No. 13-4062 (10th Cir. July 25, 2014), the court emphasized that an employee's request for FMLA leave does not shelter the employee from the obligation to comply with a supervisor's directions. The employee took leave following a car accident, but did not return the required FMLA paperwork until after receiving multiple requests and deadline extensions. She then made only a delayed and half-hearted attempt to submit to an independent medical examination ("IME"), which the employer requested after receiving reports from co-workers of the employee engaging in physical activities which seemed inconsistent with her claims of injury. The employee was terminated for, among other things, failure to timely submit the forms, failure to schedule the IME, and abuse of sick leave.

In affirming judgment in favor of the employer on the FMLA interference claim, the court emphasized that it did not matter that the instructions with which the employee had failed to comply were related to the employee's request for FMLA leave. Rather, because there was no evidence that the reasons given for her termination were fabricated, the employee's claim failed.

Similarly, in *Lopez v. Lopez*, No. 2:10-06374 (D.N.J. Feb. 4, 2014), the court ruled against an employee who was terminated for violating policies prohibiting abusive conduct and property destruction. After becoming frustrated during an irate customer call, the employee, who had only recently returned from a stress-related FMLA leave, picked up a computer monitor and slammed it on his desk, scaring co-workers. The employee was permitted to take another FMLA leave following the incident, but was terminated upon his return due to his conduct. Claiming FMLA retaliation, the employee cited the timing of his leaves and termination, along with evidence that the employer had questioned the legitimacy of the second FMLA leave. The court determined, however, that the incident in which the

employee “lost control” established a legitimate, non-retaliatory reason for termination, and found no evidence of pretext.

In *Hamilton v. Republic Airways Holdings*, No. 1:12-cv-01614 (S.D. Ind. July 2, 2014), the court rejected both FMLA interference and retaliation claims alleged by a flight attendant who was terminated for refusing to handle an assigned flight and for attempted abuse of FMLA leave. Recorded phone calls showed that the employee had repeatedly tried to avoid the assignment because she did not have any change in clothes or other personal items with her. After being reminded that refusing an assignment was against policy, she had “abruptly changed course” by “flippantly” stating, “okay, well I have a migraine then, so you can call me off then - I’m just FMLA then.” The employee also was overheard on a hotel shuttle stating that she hadn’t wanted to work, so she’d said, “No! FMLA.” The court ruled that no reasonable juror could find the employee credible, and that the employer had sufficient grounds to have honestly and reasonably suspected FMLA misuse. Notably, the court rejected the employee’s argument that the employer could not have honestly suspected abuse because it did not consult a medical professional to determine whether she in fact had a migraine, noting that the employee had failed to cite any cases requiring a medical opinion in order to form an honest belief of FMLA abuse.

The key takeaway from these cases is that employees do not receive a “free pass” to violate policies simply because they have requested, are on, or have taken FMLA leave. Rather, employers have a right to expect all employees to comply with established policies, even when the FMLA is implicated in some way with respect to the policy violation at issue.

That said, employers should keep in mind the following principles when evaluating whether to take action against an FMLA-protected employee who has violated an employment policy:

- Ensure that an investigation into the situation is conducted prior to taking adverse action.
- Avoid decisions that are rushed, made without obtaining the employee’s side of the story, or based on assumptions about the employee’s ability to work.
- Be prepared to show that the policy at issue is established, well-known to employees, and consistently enforced.

Employers should recognize that, where an adverse employment action is based in whole or in part on a belief that the employee has misused the FMLA, the court will conduct a fact-specific inquiry to ensure that the evidence shows that the belief was honestly and reasonably held. Also, be aware that, in some jurisdictions, while an honest belief of FMLA abuse may be sufficient to defeat an FMLA retaliation claim, it may not be sufficient to defeat an FMLA interference claim.

For questions or further information on this topic, please speak to your regular Bryan Cave contact, a member of our [Labor and Employment Client Service Group](#), or the author of this Alert:

Christy E. Phanthavong
Counsel, Chicago
312 602 5185
christy.phanthavong@bryancave.com