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Another Court Agrees: FMLA Leave Does Not Equal Absolute Job Protection

By Kate McGovern Tornone, Editor

Employers do not have to ignore misconduct discovered during—or even because of—an employee's medical leave, the 3rd U.S. Circuit Court of Appeals—which covers Delaware, New Jersey, and Pennsylvania—has ruled, joining several other circuits.

In *Neidigh v. Select Specialty Hosp.*, No. 16-1013 (3rd Cir. Nov. 30, 2016), the appeals court held that an employer did not violate the Family and Medical Leave Act (FMLA) when it fired an employee after her supervisor discovered that she had violated the terms of a previously issued "final written warning." The fact that she was on medical leave when the supervisor made the discovery did not protect her from discipline, the court said.

Facts of the Case

Katie Neidigh worked as a respiratory therapist for Select Specialty Hospital McKeesport. After several years with the company, she became pregnant and informed the employer. About 7 weeks later, she aggravated a preexisting back impairment and was unable to work the next day.

Her supervisor took the shift and, while she was working, the family of one of Neidigh's patients reported that Neidigh had yelled at them for failing to wear infection-control gowns and gloves around their family member.

The supervisor informed the chief nursing officer, HR, and the CEO. They discussed the incident and reviewed Neidigh's personnel file, which contained reports of earlier inappropriate workplace conduct and a "final written warning," according to court documents. The warning

informed Neidigh that any further violation of the conduct rules "may result in termination." The officials decided to fire her.

Neidigh sued, alleging that the employer had discriminated against her because of her pregnancy and retaliated against her for exercising her FMLA rights. A federal district court dismissed her claims, finding that she failed to show that the employer had given a false reason for her termination.

Appeals Court Weighs in

Because Select was able to show that it fired Neidigh for repeatedly violating conduct rules, it was up to her to point to evidence from which a reasonable person could either "(1) disbelieve the employer's articulated legitimate reasons; or (2) believe that an invidious discriminatory reason was more likely than not a motivating or determinative cause of the employer's action," the court explained.

Neidigh argued that her pregnancy announcement, injury, and termination happened in such quick succession that a reasonable person could find that they were tied together. The court noted that "temporal proximity" can certainly be a valid argument, but not in Neidigh's case.

She was fired 7 weeks after she announced her pregnancy, the court said, noting that the events were too far apart to disprove the employer's reason for her termination. And even though she was fired just 4 days after taking medical leave, relevant information came to light during that time, the court said: "The timing of the revelation of the incident … together with Neidigh's disciplinary record, undermines any contention that the timing of her termination was suggestive of discrimination."

The 3rd Circuit also upheld summary judgment for the employer on Neidigh's FMLA retaliation claim. "[T]here is no evidence that Neidigh's use of leave motivated the employment decision," the court concluded. "Although her absence led to the discovery of the incident with [the patient's family], it was that incident, in the context of her prior violations, and not the fact that she was on leave, that led to her termination."

The appellate court therefore upheld the lower court's ruling.

Sister Circuits

Several appeals courts have considered similar cases in recent months, and all have made clear that employers don't have to look the other way when misconduct is discovered during an employee's medical leave.

In January, the 10th Circuit reached that conclusion in *Montoya v. Hunter Douglas Window Fashions, Inc.*, No. 14-1491 (10th Cir., Jan. 25, 2016). The employer discovered during an employee's leave that she was spending a lot of time on the phone and Internet for personal reasons. It issued her a warning but during a second leave, it was revealed that the problems persisted, at the expense of her job duties.

The employer fired her and she sued, but the 10th Circuit said that because the misconduct was documented and persistent—and because she had received warnings—her termination was obviously because of the misconduct and not because of her leave.

Two months later, the 11th Circuit ruled that Dollar General did not interfere with an employee's FMLA rights when it refused to reinstate her after her leave; the employer was able to show that the manager was fired because it discovered she had required employees to work off the clock, and that it would have fired her for that offense even if she had not been on leave (*Thomas v. Dolgencorp*, No. 15-13399 (11th Cir. March 15, 2016)).

And in August, when the 10th Circuit considered the issue again, it went even further. This time, it made clear that employers don't have to ignore misconduct even if the conduct never would have been discovered if the employee hadn't taken leave.

A warehouse manager for Penske had no FMLA interference claim when he was fired because his temporary replacement found that he had been hiding inventory losses and lying about it. The fact that the misconduct wouldn't have been discovered if he hadn't taken leave did not protect him from discipline, the court said (*Olson v. Penske Logistics, LLC*, No. 15-1380 (10th Cir. Aug. 26, 2016)).

The 4th Circuit echoed this sentiment in October in *Sharif v. United Airlines, Inc.*, No. 15-1747 (4th Cir. Oct. 31, 2016)). The employee was fired using an intermittent FMLA leave day to extend a vacation but he argued that he would not have been fired but for taking FMLA leave. If he had merely skipped his shift, he would have been penalized, but not fired, he said. The court, however, wasn't unpersuaded. The employee was fired for *fraudulently* taking FMLA leave, it said.

While the FMLA protects an employee from adverse employment actions taken because he or she exercised his or her FMLA rights, it does not protect them from discipline for misconduct discovered during leave.

The opposite conclusion would produce an absurd result, the 11th Circuit noted in an earlier opinion (*Schaaf v. SmithKline Beecham Corp, d.b.a. GlaxoSmithKline*, 602 F.3d 1236 (11th Cir. 2010)).

If employees were protected from discipline for misconduct discovered during leave, an employee who had broken a rule could take leave and hope that the employer discovers the actions, thereby preventing it from ever disciplining him for the misconduct, the *Schaaf* court said. "[T]he leave would always be the but-for cause of the discovery of that evidence … Such a laughable result is not supported by policy, by common sense, or, most importantly, by the statute itself."