

Fear of Failure – Terminating Employees with Extensive FMLA and non-FMLA Absences

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Fear of Failure – Terminating Employees with Extensive FMLA and non-FMLA Absences

By Tasos C. Paindiris on March 21, 2017

It's a scenario that frustrates many employers. An employee with extensive intermittent FMLA absences, possibly including absences for different covered reasons, is also absent for many unspecified or unprotected reasons which lead to progressive discipline. The employee's absences eventually reach the point of warranting termination and the employee does not provide additional medical information to address the unprotected absences. The employer is prepared to proceed with termination but is concerned about whether it did enough to track protected absences and communicate with the employee to avoid FMLA interference and retaliation claims.

Employers are in a much better position to defeat FMLA interference and retaliation claims with meticulous tracking of time off and communication with the employee regarding unexcused absences. The U.S. Postal Service provided a recent example when the Court dismissed a former employee's claim in *Dulany v. U.S. Postal Service* (N.D. OK March 14, 2017). Ms. Dulany had approximately 49 intermittent FMLA absence to care for her mother. She was also absent approximately 47 times due to her own FMLA covered health condition. During the same time period, Ms. Dulany received multiple warnings for failure to report to work, arriving late and leaving early without following proper procedures. Ms. Dulany then requested a

leave for approximately a month and provided a note from her doctor but did not request FMLA. The USPS sent her documents regarding the information she would need to submit for the FMLA to apply but she did not provide the requested information.

The Court dismissed Plaintiff's FMLA claims because there was no evidence she was actually denied leave. The USPS has a policy in place for employees to call in and report all FMLA absences. The evidence showed that when Ms. Dulany utilized that system, the absences were tracked as FMLA. Ms. Dulany claimed that her supervisor once said they did not have to honor her request for time off under the FMLA. The employer's records however reflected that the days at issue were in fact counted as FMLA and the Court disregarded the alleged comments by the supervisor. Regarding the employee's month long absence, she claimed that employees do not need to specifically mention FMLA to seek protection and she provided sufficient notice of her need for leave. While Ms. Dulany was correct regarding her obligations under the FMLA, the USPS demonstrated that it took proper steps to provide her the required FMLA paperwork and Ms. Dulany failed to follow the employers' usual leave policies and procedures in response. Her submission of a doctor's "note" was not sufficient to provide FMLA protection.

This case demonstrates the importance of thorough record keep relating to FMLA absences and related communications with the employee. Despite the employee's attempt to create a factual dispute with both the supervisor's comments and the employer's handling of the month long leave, the employer's records demonstrated that it counted all reported FMLA absences as protected, that no unprotected absences were used against her, and that it met its obligation to

provide the employee an opportunity to obtain FMLA coverage for the month long unprotected leave.

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