Why Can't I Terminate My Employee for An Unexcused Absence!?

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By Jennifer Dew on January 31, 2017

The California Court of Appeals' recent decision in Bareno v. San Diego Community College is a good reminder for employers about the pitfalls of terminating an employee based on a "technical" policy violation and how easy it is for an employee to put an employer on notice that the employee is taking a protected California Family Rights Act ("CFRA") leave. In that case the employee, Leticia Bareno, requested and took a week long medical leave from work. She provided the required medical certification for the leave. When the leave expired, she did not return from work and was absent for an additional five consecutive days. Relying on the collective bargaining agreement between the parties which stated that an absence from duty without authorization for five days constituted a voluntary resignation, Ms. Bareno's employer, San Diego Community College, terminated her employment. Although Ms. Bareno claimed to have sent a medical certification for the unexcused period, the College had not received it.

Ms. Bareno had a long history of unexcused absences. In 2006, the College had entered into an 18 month last chance agreement with her because of her attendance issues. She was reprimanded in 2012, again for attendance issues. In 2013, when the events of this case took place, her initial week of medical leave came on the heels of a three-day unpaid suspension for the exact same issue. Following the suspension, on the Monday she was due back, she had called her supervisor and said that she would be absent because she had to seek

medical attention. She followed up later the same day with an email stating that she would be out the entire week. Her supervisor requested a doctor's note, which she provided and which confirmed her need to be out for that week. On Friday, she emailed her supervisor's boss, stating that she wanted to appeal her three-day suspension, and further that she was out on a medical leave and would notify all about her return date. That same day, she sent an additional doctor's note stating that she would be out another, now second week, but her supervisor did not receive it. The next week came and went with no word from Ms. Bareno. The College then terminated her employment under its policy that she was deemed to have voluntarily resigned based on her five days of unexcused absences. Subsequent communications between the parties included a doctor's note that Ms. Bareno claimed had been timely sent, but which the College said it had not received, and another note excusing her for the second week. The College stood by its termination decision, and ultimately Ms. Bareno filed suit claiming she had been terminated in retaliation for taking a CFRA leave. The College moved for summary judgment, which the trial court granted, and Ms. Bareno appealed.

On appeal, the College argued that Ms. Bareno could not state a claim for retaliation for taking a CFRA leave because she had not requested one. The appellate court disagreed. In reviewing the statute and regulatory scheme, it concluded that Ms. Bareno's cryptic email to her supervisor's boss stating that she wanted to appeal her suspension and was on a "medical leave" was enough to put the College on notice that the period following the initial approved week may have also been for a CFRA leave. In other words, having received this email, it was

now the College's obligation to inquire further, as opposed to waiting to hear from Ms. Bareno.

What are the take-aways here for employers? First, it is easy to see how frustrated the College must have been with Ms. Bareno given her history of unexcused absences and how easy it was to simply wait out the five days instead of contacting her. But such "gotcha" policy violations are seldom as simple as they appear. When protected leaves may be involved, it is up to the employer to ask and ask again! Second, this case also illustrates how giving employees too many chances to correct the same issue seldom benefits the employer in the end. In almost all cases, if an employee is unable to perform the essential functions of the job at hand, the employer will be better off telling the employee that it is time to move on!