



FMLA Fraud Finding Leads To Employer Court Victory

3 THINGS YOU NEED TO KNOW ABOUT LATEST DECISION

Insights

11.03.16

An employer recently claimed a significant victory in a case brought by a former employee who believed he had been unfairly targeted for termination because of his Family and Medical Leave Act (FMLA) leave request. The federal court of appeals decision is significant because it provides support for those employers who wish to root out fraudulent abuse of FMLA leave from their workplaces, offering a blueprint for how to navigate such a situation.

Here are three things you need to know about this important decision:

1. Good Facts Make Good Law

If the old saying “bad facts make bad law” is true, then this case is proof that the converse is also true. By attempting to maintain a FMLA retaliation lawsuit despite engaging in questionable behavior, the ex-employee in this case helped create good law for employers everywhere.

Masoud Sharif was a customer service agent for United Airlines. In 2009, he was diagnosed with anxiety disorder and requested intermittent FMLA leave from United to be taken when he suffered panic attacks. Over the next several years, Sharif requested and United granted over 50 days of intermittent FMLA leave.

In March 2014, Sharif traveled to South Africa for a long vacation, using accumulated personal time off to cover almost his three-week absence from work. However, he was unable to successfully bid for vacation leave to cover a scheduled shift on March 30, right in the middle of the vacation, and was unable to find another employee who would agree to swap shifts. At 7:00 a.m. Cape Town time – which was 1:00 a.m. Eastern time – on that day, he called into United Airlines and left a message for his supervisors that he would be taking intermittent FMLA leave to cover that shift because of a panic attack. He then continued with his vacation for another week or so, which included a final stop in Milan, Italy to visit family.

United sensed something was fishy about his intermittent leave request given that it happened to coincide with the one, single day where he was scheduled to work in the midst of an extensive vacation. When he returned to work, a Human Resources representative interviewed Sharif (with a manager and a union representative present) and asked him about the March 30 absence. According

to United, Sharif sat in silence for a period of minutes and then provided a series of inconsistent answers.

At first he claimed that he did not know that he was scheduled to work at all on March 30, but then was unable to explain he felt the need to call in on that specific day. He then claimed that he didn't remember calling in sick that morning. He then said that he had been trying to fly home on standby to make it back to the U.S. for his shift but that all of the flights were full. That story evolved to include Sharif saying that the failure to find a standby flight led to a panic attack, leading to his FMLA request, which he now remembered making.

United management didn't buy his story, and notified him that it intended to terminate his employment for fraudulently taking FMLA leave and for making dishonest statements during the investigation. At the advice of his union, Sharif resigned under threat of termination. He then filed the FMLA retaliation lawsuit in a Virginia federal court, which eventually dismissed his case. He appealed that dismissal to the 4th Circuit Court of Appeals (covering Virginia, North Carolina, South Carolina, and West Virginia), which upheld the dismissal in an October 31, 2016 opinion.

2. Employer Conducted A Smart Investigation

The court gave Sharif every opportunity for Sharif to present evidence or arguments that would support his position, but in the end, it was more impressed with the evidence presented by the employer. That evidence demonstrated that the employer took its time, conducted a swift but thorough investigation, considered all possibilities, and then arrived at a reasonable conclusion based on objective information.

United proved that it conducted a methodical and thorough investigation. It pointed out that it reviewed Sharif's work calendar and the time and place of his phone call, among other things, in an attempt to understand his story. The court also noted that United examined Sharif's story about attempting to fly home on a standby flight, but was unable to locate any evidence that a standby request was made. Also, United did not immediately terminate Sharif's employment, instead taking sufficient time to consider all of his explanations. It even allowed him to present a written version of his story when he claimed that his anxiety disorder contributed to his less-than cogent explanation on the day of the investigative interview.

Further, the court noted that United showed no signs of bias against employees who took FMLA leave. In fact, in the two years prior to the investigation, the employer approved 56 days' worth of intermittent leave requested by Sharif, never once rejecting his requests. "This is not the record of a company that is historically hostile to FMLA leave in any discernable way," the court said.

Finally, the court was impressed with the fact that United presented a consistent explanation for its investigation and the termination notification at every step along the way, from the time of the initial investigation, through the union process, in written correspondence to Sharif, and during the subsequent litigation. "Unlike Sharif's shifting narrative," the court stated, "the company's explanation for its action has remained a consistent one." The court concluded that

explanation for its action has remained a consistent one. The court concluded that misrepresentation and disability fraud were serious issues that could justify termination. It summed up its decision when it said: “While a company may not deny valid requests for leave, and an employer cannot use allegations of dishonesty as a pretext for subsequent retaliation, it is equally important to prevent the FMLA from being abused.”

3. Employers Can Question Intermittent Leave When Appropriate

Employers often say that intermittent leave requests are among the most challenging problems they face. However, there are several strategies available to employers to combat intermittent leave abuse. One of the most effective, as demonstrated here, includes following up on changed or suspicious circumstances.

If the circumstances described by the existing FMLA certification have changed, you may seek recertification more frequently than 30 days. The same is true if you receive information that casts doubt on the employee’s stated reason for the absence or on the continuing validity of the certification. This could include a different frequency or duration of absences, or increased severity or complications from the illness. You are permitted to provide information to the health care provider about the employee’s absence pattern and ask if the absences are consistent with the health condition.

You may also receive information about employee activities during FMLA leave that appear inconsistent with the health condition (for example, an employee playing in a softball game while on leave for knee surgery). A note of caution, however – if you receive information from coworkers about an employee’s actions while on leave, you must be certain the information they receive is credible and that the coworker has no axe to grind against the person on leave. Always attempt to independently verify information received from coworkers before taking action or requesting recertification for suspicious circumstances.

There are several other strategies available for dealing with intermittent leave abuse; a good summary can be found [here](#).

If you have any questions about this case or how it might affect your business, please contact your Fisher Phillips attorney.

This Legal Alert provides an overview of specific federal court case. It is not intended to be, and should not be construed as, legal advice for any particular fact situation.

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Richard R. Meneghello

Chief Content Officer

503.205.8044

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