

Employer hit with bad-faith double damages in FMLA suit

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When an employee takes leave under the Family and Medical Leave Act (FMLA), she's expected to specify a return-to-work date. If she fails to come back to work following the leave, her employer may terminate her.

However, the devil is in the details, and you should be careful about acting too swiftly. There may be extenuating circumstances that would allow an employee to extend the FMLA leave. Also, the consequences of a premature termination can be quite significant, as a Virginia employer recently found out.

Facts

Lisa T. Perry worked in a director position for Isle of Wight County. In May 2014, she fell through a hatch on the deck of a sailboat and injured her shoulder, sustaining a fracture in her upper left arm. Her doctor prescribed pain medication and instructed her to wear her arm in a sling for 30 days. Except for taking off a few days at the end of May, she worked through May and most of June.

In late June, having obtained no relief, Perry saw another physician, who diagnosed her with "frozen shoulder" and prescribed aggressive physical therapy. The doctor recommended that she take at least 30 days off from work, and she was approved for FMLA leave until Thursday, July 31. At her July 31 medical checkup, she was advised not to return to work until Monday, August 4. However, she failed to inform the county of her need to take additional leave.

When Perry failed to show up for work on Friday, August 1, the county considered her as having voluntarily resigned from her position. On Monday, August 4, Perry showed up for work. She was promptly informed that she had voluntarily resigned and that she had been sent a letter stating her employment was terminated.

Perry's suit

Perry filed a lawsuit against the county in Norfolk federal court claiming that it had violated the FMLA by failing to reinstate her employment and retaliating against her for seeking FMLA leave. The crux of the case was whether the county lawfully terminated her employment when she failed to return to work on August 1.

Perry didn't dispute that the county's policy manual provided that "if an employee fails to return to work following the conclusion of FMLA leave, the employee will be considered to have voluntarily resigned." However, she pointed to the FMLA regulations, which provide that "where an employee needs to take more leave than originally anticipated . . . the employer may require that the employee provide the employer reasonable notice (i.e., within two business days) of the changed circumstances where foreseeable." Moreover, the leave documents the county provided her informed her that she had to notify it within four business days of any changed circumstances that extended her FMLA leave.

Court's ruling: double damages

Because Perry appeared for work on Monday, August 4—within the FMLA's two business days and well before the county's four-business-day deadline—the court ruled that she complied with the requirements of both. As a result, the county had violated her rights when it terminated her employment.

As a remedy, the court held that the county was liable for Perry's lost salary and benefits from the time she was terminated until the court's judgment in the amount of approximately \$275,000.

The court also awarded Perry an equal amount in so-called liquidated damages because it found that the county had acted in bad faith when it failed to reinstate her. Specifically, it noted that the county's HR director

knew that she had an appointment with her doctor on July 31, and there was a possibility that the doctor would extend her FMLA leave. The HR director also knew that the county's policy manual permitted her to notify it of any changed circumstances within four business days of learning of the need for additional leave. Nevertheless, HR barely waited one business day before concluding that she had voluntarily resigned and terminating her employment.

Although the county had given nonmandated warnings and notices to other employees regarding the expiration of their FMLA leave, the court further noted that this didn't occur in Perry's case. Instead, it found that the county's "Human Resources personnel waited attentively for [her] to contact them on August 1, 2014 and then quickly terminated her that same day." It said that these actions were "unreasonable, especially in light of [the county's] history of actively reaching out to their employees to avoid any accidental voluntary resignations." Given the county's unreasonable conduct, the court found that it had to pay Perry an additional \$275,000 in damages.

Front pay

Normally, the remedy for an unlawful termination is reinstatement. But by the time the case was decided, Perry's former position with the county had been filled. Therefore, in lieu of reinstatement, the court awarded her front pay instead. It was mindful that front pay "must compensate [her] future losses while also ensuring that it does not become too much of a speculative venture. Under one scenario of future events, [she] could be left without a remedy and under another [she] could end up with a windfall. In either case, an injustice is done to one party or the other."

With these principles in mind, the court awarded Perry two years of front pay in the amount of \$196,000. This amount was based on the fact that she had been making \$98,000 a year in pay and benefits and had been unable to obtain and probably couldn't obtain comparable employment. Additionally, she had no college degree and had achieved her former position with the county through years of learning on the job. *Perry v. Isle of Wight County*, No. 2:15cv204 (E.D. Va., Aug. 10, 2017) (Jackson, J.).

Bottom line

FMLA mistakes can be expensive. Before terminating an employee who fails to return from FMLA leave, try to

find out why. If she doesn't respond, then you have a basis to terminate her for job abandonment. But if she says that additional leave is necessary and she has FMLA leave available, provide her with the paperwork for a leave extension.

If the employee has used up all available FMLA leave, she still may be entitled to additional leave as a reasonable accommodation under the Americans with Disabilities Act (ADA). Often an FMLA "serious health condition" will also be an ADA-covered "disability," and the Equal Employment Opportunity Commission (EEOC) has said that leave for medical treatment is a type of reasonable accommodation. The ADA doesn't set a specific upper limit for leave as a reasonable accommodation. The EEOC takes the position that you may need to extend leave until it becomes an undue hardship on your operations.

Because of the various laws that come into play when dealing with employee medical leave requests and the consequences that can flow from making a wrong decision, it's always wise to consult with experienced employment counsel before terminating an employee who fails to return from leave. You want to make sure that you have covered all your bases and can adequately defend and legally justify whatever action you decide to take.

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