

November 16, 2012

An Employer's Measured Response to Suspected Workplace FMLA Fraud Wins the Day

By Tracy Stott Pyles and Russell Zimmerer

The U.S. Court of Appeals for the Sixth Circuit issued its decision in *Jaszczyszyn v. Advantage Health Physician Network*, 2012 U.S. App. LEXIS 23162 (Nov. 7, 2012), affirming summary judgment for an employer in a case alleging retaliation and interference under the federal Family and Medical Leave Act (FMLA).

The court's decision focused heavily on the fact that the employer, Advantage Health Physician Network ("Advantage"), proactively initiated plaintiff Sara Jaszczyszyn's FMLA leave and took a measured approach in response to suspicions of fraud, rather than terminating first and asking questions later. In this case, Advantage terminated Jaszczyszyn's employment only after conducting an internal investigation and directly discussing concerns with her about potential fraudulent conduct – concerns that were supported by an "honest belief" of fraud after Jaszczyszyn posted photographs on Facebook that were inconsistent with her FMLA leave.

The Facts

Jaszczyszyn was employed by Advantage starting in January 2008. In July 2009, while serving as a customer service representative in Advantage's billing office, Jaszczyszyn began experiencing "flare-up" back pain from an automobile accident that had occurred 10 years prior. About a month later, Jaszczyszyn's physician determined that she was "completely incapacitated" and unable to report to work from August 31 to September 7.

Because Jaszczyszyn did not have enough accrued paid time off to cover her absences, Advantage recommended that she take FMLA leave to protect her job. Advantage provided Jaszczyszyn with the paperwork necessary to request FMLA leave. The relevant paperwork also informed Jaszczyszyn of her rights and responsibilities under the FMLA, as well as the fact that she would be required to maintain regular contact with her supervisor regarding her work schedule and to comply with Advantage's normal absence notification requirements.

On September 9, Jaszczyszyn submitted another document from her physician which noted she was having about four flare-ups a month and would be unable to perform her job functions during a flare-up. Advantage approved Jaszczyszyn for intermittent FMLA leave.

From the beginning of her FMLA leave, Jaszczyszyn failed to fulfill her obligation to report her “intermittent” leave to Advantage, and the company routinely had to remind Jaszczyszyn of her responsibilities. In addition, Jaszczyszyn treated the leave as continuous and open-ended, and never returned to work after September 9.

Notwithstanding these facts, Advantage treated all of Jaszczyszyn’s absences as taken pursuant to the FMLA and, despite having concerns regarding the continuous absences, did not question her use of the intermittent FMLA leave. On September 22, after approximately three weeks of continuous absences, Jaszczyszyn finally provided Advantage with an update from her doctor noting a “projected length of disability” from September 10 through October 5. Eight days later, on September 30, the doctor provided another note indicating that Jaszczyszyn would be completely incapacitated for an additional three weeks – until October 26.

Three days later, on October 3, Jaszczyszyn attended a local festival with friends. Her escapade was well documented by a friend via 127 pictures, several of which Jaszczyszyn posted on her Facebook page. During that same festival weekend, Jaszczyszyn left phone messages for her supervisor reporting that, due to her back pain, she would not be coming into work on the following Monday.

Jaszczyszyn was Facebook “friends” with her coworkers and supervisor, so they could view these festival pictures. One of Jaszczyszyn’s coworkers was upset by the behavior in the photographs and reported them to the supervisor. Jaszczyszyn’s co-workers felt betrayed and duped since they were all covering for her, yet she was out having fun. The supervisor forwarded the complaint and some of the photographs to Advantage and an investigation ensued. Advantage, as part of its investigation, contacted Jaszczyszyn and requested that she report to the office to discuss issues relating to her leave. In accordance with its normal business practices, Advantage also prepared a “Corrective Action Notice” (Advantage’s notice of termination with a statement of the problem) to be used at the meeting, if necessary.

On October 8, Jaszczyszyn reported to the meeting during which she and Advantage discussed her communication issues, request for additional leave, job duties, and how, exactly, her alleged condition rendered her completely incapacitated from doing those duties. The parties also discussed that Advantage took fraud very seriously – a fact Jaszczyszyn admittedly knew. Advantage then questioned Jaszczyszyn about the Facebook pictures, which seemed inconsistent with her being “completely incapacitated.” Jaszczyszyn did not deny her conduct or offer any explanation to her actions; she did not even dispute that there was a discrepancy between her stated status and what the pictures evidenced. The only retort Jaszczyszyn offered Advantage was that no one told her it was prohibited conduct. Because she did not offer any reasonable explanation of the discrepancy between her claim of complete incapacitation and the photographs depicting the events at the festival, the decision was made to terminate her employment at the conclusion of the meeting.

The Law

Jaszczyszyn filed suit, claiming retaliation and interference related to her purported FMLA leave. The two theories of recovery she sought under the FMLA are separate and distinct: the “interference” or “entitlement” theory, grounded in section 2615(a)(1); and the “retaliation” or “discrimination” theory, grounded in section 2615(a)(2).

To prove her interference claim, Jaszczyszyn must establish that: (1) she was an eligible employee; (2) Advantage was a covered employer; she was entitled to FMLA leave; (4) she gave provided Advantage notice of her intent to take leave; and (5) Advantage denied her FMLA benefits or interfered with her FMLA rights.

To establish her retaliation claim, Jaszczyszyn must prove that: (1) she engaged in an FMLA protected activity; (2) Advantage knew she was exercising her FMLA rights; (3) after learning she exercised her FMLA rights, Advantage took adverse employment action against her; and (4) there was a causal connection between the protected FMLA activity and adverse employment action.

In affirming the district court’s grant of summary judgment on the interference claim, the Sixth Circuit reiterated its earlier holding in *Seeger v. Cincinnati Bell Tel. Co.*, 681 F.3d 274 (6th Cir. 2012), that, where an employee has “received all of the FMLA leave to which he is entitled,” any interference claim must fail. In dismissing this claim, the court emphasized that Advantage never questioned or denied Jaszczyszyn’s request for FMLA leave and indeed allowed her to take time off, treated it as FMLA protected leave, and paid her for that time, before she had even completed the necessary paperwork.

Addressing Jaszczyszyn's retaliation claim, the court rejected her direct evidence argument premised upon a termination form completed by her supervisor that listed "absenteeism" as the reason for termination, rather than fraud. The court noted that the supervisor completing the form was not responsible for the decision to terminate Jaszczyszyn, Advantage was not required to check the "other" box to specifically explain fraud as the basis for termination, and, at any rate, "absenteeism" was an accurate description of her behavior.

The court reiterated that the framework of *McDonnell Douglas v. Green*, 411 U.S. 792 (1978), provided the correct approach for analyzing Jaszczyszyn's retaliation claim, and examined the last element – was there a "causal connection" between the protected FMLA activity and termination. The court noted that Jaszczyszyn offered "little or no evidence" on this element while Advantage proffered evidence of an adequate investigation and a termination decision that largely turned on Jaszczyszyn's own behavior during the termination meeting. The court also rejected Jaszczyszyn's argument that, since the Corrective Action Notice was completed before the termination meeting, it was evidence of pretext on the basis that it was Advantage's standard practice to prepare the notice in advance.

The court did not decide whether the "honest belief" rule applies to FMLA interference claims, but did apply it to the retaliation claim. The court noted that Jaszczyszyn did not "refute" Advantage's honest belief that she committed FMLA fraud – a belief prompted by the photographs Jaszczyszyn posted on Facebook for all of her "friends" to view that showed her engaged in conduct that did not match her claims of being "completely incapacitated" from work.

In the end, the court found that "Advantage 'rightfully considered workplace [FMLA] fraud to be a serious issue,' and its termination of Jaszczyszyn because of her alleged dishonesty constituted a non-retaliatory basis for her discharge."

While the court's decision in *Jaszczyszyn* can serve as a "how-to" for employers, it is also a cautionary tale for what could have been had the employer deviated from its general business practices.

Implications for Employers – the Takeaways

- Be aware and beware of social media. Facebook, like many other social media outlets, provides a wealth of information. That being said, there are some causes for concern with having supervisors and employees (even coworkers) be Facebook "friends" – and, while the court did not address it in the instant matter, the National Labor Relations Board, among others, has issued guidance relating to the proper and improper use and/or review of an employee's Facebook postings.
- Don't rush to judgment – follow a decision-making process. Here, the court reemphasized the use of the "honest belief" standard when reviewing an employer's decision-making process. Given this, a company should be prepared to show its belief, how it arrived there, and the information it reviewed in reaching the ultimate decision.
- Documented investigations are crucial. Here, the company was able to refute the plaintiff's interference claim by providing the entitled FMLA leave, even when questions and concerns arose, before acting. Had it not conducted an appropriate investigation and merely terminated the FMLA entitlement as soon as suspicion arose, the end result may have differed.
- Follow standard operating procedures and practices. Here, the company was able to articulate why a termination notice was created *prior* to the meeting with the employee and avoided what could have been a damaging pretextual argument.

[Tracy Stott Pyles](#) is a Shareholder in Littler Mendelson's Columbus office, and [Russell Zimmerer](#) is an Associate in the Dallas office. If you would like further information, please contact your Littler attorney at 1.888.Littler or info@littler.com, Ms. Pyles at tpyles@littler.com, or Mr. Zimmerer at zimmerer@littler.com.