

Publication

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You're Fired: One Good Reason for Employees Not to Ask for FMLA Leave When Their Facebook Photos Negate Such Entitlement

In yet another case of Facebook firing, the United States Court of Appeals for the Sixth Circuit (with jurisdiction over Kentucky, Michigan, Ohio, and Tennessee) recently held in *Jaszczyszyn v. Advantage Health Physician Network*, that an employer did not violate the Family and Medical Leave Act ("FMLA") when it terminated an employee after Facebook photos showed the employee drinking at a festival at the same time she was claiming that she was incapacitated due to a medical condition. In affirming summary judgment for the employer on the employee's FMLA interference and retaliation claims, the Sixth Circuit found significant that the employer did not rush into judgment when faced with clear evidence of the employee's fraud. Rather, the employer terminated the employee only after conducting a thorough and adequate investigation and giving the employee a chance to explain her conduct based on the employer's "honest belief" that the employee's behavior in the photos was inconsistent with her claims of total disability.

BACKGROUND

The plaintiff, in *Jaszczyszyn*, was employed by Advantage Health Physician Network (the "Company") in January 2008, after her physician fully released her to work following a back injury that the plaintiff had suffered several years prior. Several months into her employment,

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the plaintiff started complaining of increasing back pain and submitted a work release form to the Company that declared her “completely incapacitated” from August 31 to September 7, 2009.

The Company advised the plaintiff to apply for FMLA leave and provided her the necessary FMLA paper work, including the Company’s FMLA policies and procedures. Upon her return to work on September 8, the plaintiff submitted medical documentation indicating that she would need intermittent leave for “flare ups,” which were estimated to occur about four times per month and last anywhere from a few hours or days. During the flare ups, the plaintiff was unable to perform all of her job functions.

While the Company approved her request for intermittent leave, the plaintiff treated the leave as continuous and did not return to work after September 9. She later submitted an additional certification from her physician, indicating that she would be disabled from September 10 to October 5. Several days later, she provided a work release form indicating that she was completely incapacitated for an additional three weeks, from October 5 to October 26. The Company approved the leave beginning on September 10 but not the one beginning on October 5.

On October 3, during the time she was apparently incapacitated, the plaintiff attended “Pulaski Days,” a local Polish heritage festival, where she spent more than eight hours socializing with friends. She also posted several pictures from her festival escapade on her Facebook page. That same weekend, however, the plaintiff left several voice messages for her supervisor indicating that she was in pain and would not be able to come to work on the following Monday, October 5.

Because the plaintiff was Facebook “friends” with several of her co-workers, including her supervisor, it did not

take long for the news to come out. Upon seeing the photos, the plaintiff's supervisor notified the Company officials, and the Company launched a formal investigation. As part of the investigation, the Company invited the plaintiff back to the office to discuss her leave of absence. During the parties' meeting, the Company addressed the plaintiff's failure to communicate with the Company regarding her FMLA leave, her additional request for leave and the effect that the plaintiff's injuries had upon her ability to perform her job requirements. Importantly, before addressing the incriminatory Facebook evidence, the Company obtained the plaintiff's admission that she was aware that the Company took fraud "very seriously." The rest of the meeting was spent discussing the Facebook photos. Not surprisingly, the plaintiff was unable to reconcile her claim of complete incapacitation with her activity in the photos, or give any reasonable explanations for her conduct. Her only defense was that she was not told that she was prohibited from attending such events, and that "she was in pain at the festival and was just not showing it." At the conclusion of the meeting, she was terminated.

THE COURT'S DECISION

The plaintiff brought FMLA interference and retaliation claims against the Company and the Sixth Circuit granted summary judgment for the Company. In dismissing the plaintiff's argument that the Company interfered with her FMLA rights because it failed to reinstate her at the end of her first period of medical leave, the Court concluded that the failure to reinstate was solely due to the plaintiff's stated inability to return to work due to her medical condition. Because the Company had granted all the leave the plaintiff was entitled to receive at the time the investigation into her conduct began, and had paid for all of her time off prior to her termination, there was no interference with her FMLA rights.

The Sixth Circuit disposed of the FMLA retaliation claim by finding that the Company had an “honest belief” that the plaintiff had engaged in fraud. Under the “honest belief” standard, an employer must show that it had reasonably relied on the facts at issue in making the employment decision, even if the reason is later found to be mistaken, foolish or baseless, i.e. the employer’s reason is not a pretext. First, the Court noted that the plaintiff had “little or no evidence” to establish that her FMLA leave caused the Company to terminate her employment, while the Company put forth evidence that it conducted an adequate investigation and made the termination decision mainly based on the plaintiff’s responses at the termination interview. The Court also rejected the argument that the Company’s preparation of a termination notice in advance of the parties’ meeting constituted evidence of pretext, because it was the Company’s standard practice to prepare such notices in advance. Because the plaintiff did not “refute” the Company’s “honest belief” that the behavior depicted by her Facebook photos was inconsistent with her claims of total disability, the Court found her dishonesty to be a legitimate basis for her discharge.

LESSON LEARNED

The case is important for a couple of reasons. First, given the Court’s focus on the “honest belief” defense when reviewing an employer’s decision, employers must be adequately prepared to explain and justify their adverse employment actions. Thus, even when an employee is caught red-handed – regardless of whether an employee’s acts relate to FMLA abuse or other prohibited behavior – they must not rush to judgment. Employers must conduct a thorough investigation into the particularized facts of each case, in accordance with their operating policies and practices, and give employees an adequate opportunity to explain their acts



before deciding to take an adverse action against employees.

In addition, while the use of social media was not at issue in this case, employers should be cautious when reviewing the social media sites of their employees to determine if the employees are engaging in employment-related misconduct. Just because employees' social media accounts provide a wealth of information regarding the employees' personal lives and opinions, that information is not all "fair game" and its improper use may lead to serious legal consequences for employers. Particularly in light of the National Labor Relations Board's recent developments and guidance in the social media realm (which we addressed in our previous alerts), employers should consult with counsel when using social media outlets as the basis for their employment decisions.