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# Watch that Frown: Mere Discouragement Enough to Violate the FMLA

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By Zoe J. Bekas

There has never been a better time for employers to train managers on the basics of Family and Medical Leave Act (FMLA) rights and appropriate responses to FMLA requests. Believe it or not, FMLA rights can be violated even if no FMLA leave is denied. That's the law as affirmed by the Seventh Circuit's recent decision in *Ziccarelli v. Thomas J. Dart, et al.* In that case, the plaintiff had worked in the Cook County Sheriff's Office for 27 years, during which he periodically took FMLA leave. The plaintiff wanted to take more time off. A conversation with the office's FMLA manager discouraged him from doing so, he claimed, and forced him to retire. The plaintiff filed suit, arguing, among other things, a violation of the FMLA's anti-interference provision. Under that section, it is unlawful for an employer to "interfere with" the exercise of FMLA rights. The Court of Appeals concluded there was sufficient evidence to defeat summary judgment on the FMLA interference claim. The Court emphasized that "an employer can violate the FMLA by discouraging an employee from exercising rights under the FMLA without denying an FMLA leave request." In other words, mere discouragement can constitute unlawful FMLA interference. Another court considered a supervisor's body language (he was "visibly perturbed") in denying summary judgment on an FMLA claim. Now more than ever, training managers on appropriate responses to FMLA leave requests is essential to prevent interference claims.

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Documenting performance problems is another key to prevailing in FMLA cases. Take the *Tracy Anderson v. Nations Lending Corporation* case, for example. The plaintiff had a history of poor performance before taking FMLA leave. Four days into her leave, the company's audit system flagged more errors in her work. The plaintiff's supervisor recommended the plaintiff's employment be terminated based on these errors. The employer launched an investigation. The investigation was completed after the plaintiff returned from her leave, and the plaintiff's employment was terminated shortly after that. The plaintiff sued for interference and retaliation under the FMLA, among other claims, alleging that the employer terminated her as punishment for taking FMLA leave. The Court of Appeal confirmed the District Court's decision to grant summary judgment in favor of the employer. The takeaway—an employee is not entitled to return to her prior position if she would have been terminated regardless of whether she took FMLA leave. The employer had begun tracking the plaintiff's mistakes before she requested leave, discovered other errors during her leave, and waited to terminate her until a formal investigation was concluded. This was enough to convince the court that the plaintiff would have been terminated regardless of her taking FMLA leave.

As illustrated by the cases discussed, proper training and documentation can make or break an FMLA case. For specific guidance, contact your Akerman labor and employment attorney.

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