

EMPLOYERS CANNOT PUNISH EMPLOYEES FOR TAKING LEAVE UNDER FMLA



A decision by the Seventh Circuit Court's decision in a case has shed new light on whether employers could penalize employees for taking leave and force them to adjust their performance standards to ensure that an employee is not penalized for taking qualified leave under the Family and Medical Leave Act. The decision came in the wake of a case in which the defendant, a manufacturer and supplier of container board, employed the plaintiff as an outside salesman. The plaintiff reported having pain in his chest and asthmatic breathing as a consequence of which his work performance declined. The plaintiff argued that quite a lot of his time was spent in medical testing for his condition and for the subsequent surgery. The plaintiff was notified by the workplace that his work was not up to the mark and that his sales revenue and volume had declined over the last couple of years and if he failed to buck up he may be asked to leave the job. While the plaintiff was out on leave, the regional sales manager told him that they would be doing a sales ride-along to assess the plaintiff's performance on the following day when the plaintiff was not on leave. This was regular procedure, save for the fact that this was summarily decided whereas these are normally scheduled well in advance. The sales ride-along was duly conducted with the manager not finding it satisfactory and the plaintiff was terminated alleging poor performance during the sales ride-along along with other things. The plaintiff filed a suit under the FMLA, contending that FMLA in their act provides "eligible employees suffering from serious medical conditions, up to twelve weeks of unpaid leave during a twelve-month period." The plaintiff said that the defendant's behavior tantamount to interference and that his firing was retaliatory. The Court reversed the lower court's grant of summary judgment in favor of the employer on both claims, and remanded the case. The Court in its judgment said that as far as the interference claim was concerned the FMLA does not ask the employer to "adjust its performance standards for the time an employee is actually on the job, but it can require that performance standards be adjusted to avoid penalizing an employee for being absent during FMLA-protected leave." In this case, the court said, the employer failed to adjust the performance requirements to take into account the FMLA leave. The retaliation claim went in favor of the defendant because the court felt that inasmuch as only a day's time was given to the plaintiff to prepare for customer visits, when a week's time would have been more practicable, it could be that it was pre-determined that the plaintiff be fired and the short notice was setting the plaintiff to fail. Since his performance was declining, the employer was perhaps justified in wanting him out, but he did not time it right. It made the difference between a legal firing and an illegal one. Had the plaintiff been asked to leave prior to his taking FMLA leave, remember his performance had been declining for the last two years, his termination would not have been in violation of his FMLA rights. The employer could have contended that his firing was a disciplinary action owing to inability to live up to expected performance. The lessons from this case for the employers are that if they find their employees not living up to expectations and are detrimental to the workplace success; remedial measure must be taken pronto. Delays will invite scrutiny and the sacking may be attributed to cause other than performance, which means that not only will the employer have to pay a stiff penalty; he will also be saddled with an underperforming employee.