

Northern New England

MONDAY MORNING MINUTE

September 15, 2014

Honest Belief of Misuse of FMLA May Be Sufficient Reason for Termination

In a recent decision, the 10th Circuit held that an employer's "honest belief" that the plaintiff was misusing Family Medical Leave Act ("FMLA") leave was sufficient justification for the employee's termination and affirmed summary judgment for the employer on the plaintiff's FMLA interference claim. [Dalpiaz v. Carbon County Utah](#) (10th Cir. July 25, 2014).

Following a motor vehicle accident, the plaintiff went on a leave of absence. Despite her employer's request that she submit the FMLA health care certification, the Plaintiff did not submit the required paperwork until July 10, 2009, over three months after she went on leave and only after repeated requests by the employer. The plaintiff then returned to a modified work schedule, working two hours daily, twice per week.

While the plaintiff was on leave and while on modified duty, her co-workers and some community members reported that she was engaging in activities that seemed inconsistent with her reported injuries and limitations: "playing football with her children, working in her yard, and assisting her children with costume changes and other tasks at lengthy dance rehearsals and recitals." The plaintiff's supervisor testified that the reports of her activities became more frequent and consistent the longer the plaintiff stayed on leave. The employer ultimately received eight written statements from plaintiff's co-workers who reported observing the plaintiff's various activities.

Based on these reports, the employer directed the plaintiff to undergo an independent medical exam ("IME") to confirm that she had been entitled to FMLA leave. The plaintiff was notified twice in writing that she needed to schedule an IME from a list of three doctors. Eventually, the plaintiff reported that she was unable to schedule the IME because it required a doctor's referral and she did not attempt to obtain a referral.

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The employer terminated the plaintiff's employment based on her failure to timely complete the FMLA forms, failure to schedule an IME, untruthfulness regarding the extent of her injuries, and abuse of sick leave. The plaintiff filed suit and alleged interference with her FMLA rights.

Rejecting the plaintiff's FMLA interference claim, the court held that an "indirect link" between the reason for termination and FMLA is not enough to sustain such a claim.

In responding to the plaintiff's arguments that some of the witness reports were untrue, the court said:

What is important is not the absolute truth regarding Plaintiff's state of health, but rather whether the [employer] terminated her because it sincerely, even if mistakenly, believed she had abused her sick leave and demonstrated significant evidence of untruthfulness. And on this record, there is no evidence to suggest the county fabricated these or any of the other reasons given for Plaintiff's termination in order to justify an attempt to interfere with Plaintiff's FMLA leave.

Regardless of the accuracy of the witness statements, because the employer had an "honest belief" that the employee abused her FMLA leave, the court held that the employer was within its right to terminate the plaintiff's employment. If an employer has questions regarding an employee's potential misuse of medical leave, that suspicion must be thoroughly investigated and documented to support the employer's action.



The Portsmouth Office of Jackson Lewis P.C. was recently named a top tier "Labor and Employment" office in New Hampshire by *Chambers USA*.

Additionally, Office Managing Shareholder **Debra Weiss Ford** and Portsmouth Shareholders **Thomas M. Closson, Daniel P. Schwarz** and **Martha Van Oot** were named "LEADERS IN THEIR FIELD" in the 2014 *Chambers USA* Legal Guide.

YOU ARE INVITED!

Jackson Lewis Portsmouth Office Annual Half-Day Legal Update



Please join our Portsmouth Office for a half-day legal update on the most pressing Labor and Employment topics.

Thursday, October 9, 2014

Registration: 8:00 – 8:30 a.m. | Program: 8:30 a.m. – 12:00 p.m.

Portsmouth Harbor Events and Conference Center

100 Deer Street at 22 Portwalk Place | Portsmouth, NH 03801

For further information or to register, please see attached invitation.