

August 7, 2012

## Striking While The Iron Is Hot: Failure To Fire Employee For Attendance Problems Before Employee Triggers FMLA Covered Absence Results In Retaliation And Interference Claims

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**The Court of Appeals for the Third Circuit provided yet another lesson to employers who fail to act decisively after deciding to fire an employee for absentee and tardiness problems, holding that an employer who claimed to have decided to fire an employee before she called in requesting FMLA leave but who was not fired until after she called off work to care for her mother who had been taken by ambulance to a hospital could proceed on her FMLA retaliation and interference claims.**

*Lichtenstein v. University of Pittsburgh Medical Center*, No. 11-3419 (August 3, 2012). Although the district court below granted summary judgment to the employer and dismissed the case, the Court of Appeals held that the employee raised genuine fact questions of whether her notice to the employer was adequate, her invocation of FMLA rights was a negative factor precipitating her termination, and the employer's justification for its action was pretextual.

The employee in question could only be described as an attendance disaster. During her four months of employment, she had a history of attendance, tardiness, and scheduling problems. From October through the end of December, the employee was tardy six times, absent twice, and requested changes to her schedule on multiple occasions after the deadline for requesting such changes had passed. The most egregious incident during this time occurred on December 1st, a day which she was scheduled to work a sixteen-hour shift. In the days preceding December 1st, two

co-workers complained that she was planning to call-off if she could not find a replacement. One of these co-workers told a supervisor that the employee claimed she needed the day off to do school work and/or attend a concert. In response to these complaints, the supervisor emailed the employee for an explanation. The employee told her supervisor she was hoping to take December 1st off because it was the only day she could work on a group project for school. Although her supervisor denied this request, the employee (alleging she was sick) called off. On December 30, when she arrived several hours late and left several hours early (she was sometimes scheduled to work 16-hour shifts).

Here is where things went wrong for the employer. It claimed that the December 30 incident was the last straw and had decided to fire the employee. But, this decision was never documented and the employer continued to allow the employee to work. On January 3, the employee called in to advise her supervisor that she was at a hospital emergency room, where her mother had been taken by ambulance, and would be unable to work that day. Four days later, on January 7, she requested another leave. Finally, on January 10, the employer fired the employee for attendance and tardiness problems.

The employee then filed FMLA interference and retaliation claims, but the district court granted summary judgment to the employer on both claims. Among other things, the district court concluded that she failed to establish

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the requisite notice or prove either causation or pretext. The employee appealed. The Third Circuit concluded otherwise.

For purposes of this article, we will focus on the issue of pretext, because it brings to light the serious consequences of failing to act decisively once a decision to fire is made and to document that decision.

In this case, the employer asserted that the employee was fired due to her chronic tardiness and absenteeism, and that the last straw was her late arrival and early departure on December 30. However, there was evidence from which a reasonable trier of fact could conclude that the reason proffered by the employer was pretextual. The employer never made any attempt to document its decision to fire the employee. The only evidence that the discharge decision was made prior to the employee's FMLA leave request on January 3 was the supervisor's own deposition testimony. This failure to document the decision led inexorably to a finding that

the timing of the discharge was critical. As noted by the Court, The employer knew about the employee's attendance problems before January 3, but did not fire her until after her absence that day. As the Court observed, "the timing of [the employer's] decision could lead a fact finder to infer that [the employee] would not have been fired absent her taking of leave." *Lichtenstein*, slip op. 37, quoting with approval, *Kohls v. Beverly Enterprises Wisconsin, Inc.*, 259 F.3d 799, 806 (7th Cir. 2001). As such, the employee met her burden of showing pretext.

**Bottom Line:** This case demonstrates the importance of "real-time" documentation and decisive action. Once you decide to fire an employee, at least three things need to happen. First, review the file and make sure you have a good case. Second, document the decision once made so you can rebut accusations of pretext and retaliation. Third, go ahead and fire the employee. Delay often turns into disaster. ■

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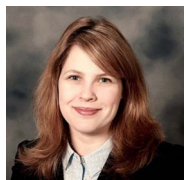
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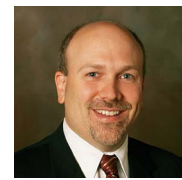
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