It’s Family and Medical Leave Act, not Friendly Medical Leave Act

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What are your obligations when an employee returns from Family and Medical Leave Act (FMLA) leave? How should you treat her? You know the answer — just like everyone else. The law forbids you from retaliating against someone for taking FMLA leave, but that doesn’t mean you can’t honestly evaluate her work performance before or after she takes her leave or even closely monitor her performance when she returns if you have a legitimate problem with it and you would do the same for any other employee.

Employee doesn’t receive warm welcome back

An air conditioning manufacturing company employed a female human resources “leader” who was responsible for staffing, employee relations, and training. She reported to the HR manager. During the first two years of her employment, she received positive performance evaluations from her boss. At the end of her second year of employment, however, an employee survey revealed dissatisfaction with the HR department, including some specific negative comments directed at the HR leader. The company held employee feedback sessions and came up with a plan to improve the HR department as a result of those sessions.

The company restructured the HR department so that the HR leader only oversaw recruiting. Her counterparts took over training and employee relations functions. Within a few months, the HR manager met with the HR leader to talk about specific problems with her performance. The manager wrote down informal notes about their meeting.

Two months later, the HR leader saw her doctor, who diagnosed a stress/anxiety disorder. The HR leader claimed her problem was job-related. Her doctor recommended a two-month leave of absence. The HR leader submitted a request for medical leave seeking two months of leave. The company approved her request and granted FMLA leave. While the HR leader was out on leave, she received a merit increase in her salary.

According to the HR leader, the company’s HR manager, plant manager, and vice president of HR were frustrated that she took a leave of absence. About three weeks into her leave, the vice president allegedly told the manager to call the HR leader and tell her that her job had been eliminated. The manager claimed he refused to fire her because he thought it might be discriminatory and violate the FMLA. The vice president agreed, and the call wasn’t made.

According to the manager, the vice president of HR called him again and asked for written documentation of the HR leader’s work performance. The manager wrote a memo documenting their meeting about her performance and gave it to the vice president. The memo

addressed nine areas of improvement, but the manager claimed none of them were a continuing problem.

But the vice president believed that all of the HR leader's performance issues hadn't been resolved. The day she returned from FMLA leave, the vice president and the plant manager confronted her with the memo prepared by the HR manager (who had resigned) and told her she needed to improve. When she asked the HR manager what happened, he told her that the vice president and plant manager weren't happy she'd taken leave and that the vice president had wanted to eliminate her job when she was on leave.

Three days later, the vice president and the plant manager met with the HR leader again to discuss the company's expectations about her work performance. They told her she needed to improve or she'd be fired. They then gave her a letter confirming their discussion, along with a performance plan.

The HR leader complained that from then on her actions at work were closely monitored and micromanaged by the plant manager and his secretary, who she thought was slated to replace her. She said she was aware of at least three HR department meetings that occurred without her. On one occasion, she received late notice of a scheduled telephone conference with the vice president of HR. When she arrived at the meeting in progress, the plant manager said sarcastically, "Oh, did we fail to tell you about the meeting?" and everyone allegedly snickered. After being back at work for less than a month, the HR leader quit her job.

The HR leader filed a federal lawsuit claiming her former employer violated the FMLA by interfering with her right to be restored to the same job she had before her leave and retaliated against her for using approved leave under the FMLA. The company asked the court to dismiss the case, and it did. She then appealed the dismissal of her case to the federal appeals court in New Orleans.

Cold shoulder wasn't enough to force resignation

The appeals court began its analysis with a recap of what the law requires. Under the FMLA, an eligible employee may take up to 12 weeks of leave in a 12-month period under certain circumstances, like when she has a serious health condition that makes her unable to perform her job duties. After an absence that qualifies for FMLA leave, the employee must be restored to the same position she held before taking leave under the Act or to a comparable position with the same pay, benefits, and status. The FMLA also protects her from discrimination or retaliation for having exercised her right to take leave.

Although the HR leader quit her job, she alleged that she was constructively discharged and the company's treatment of her violated the FMLA. She contended that the company made it so bad for her at work, she had to quit. The court explained that deciding whether an employee would feel forced to quit requires consideration of a number of facts, like whether she experienced a demotion, reduction in salary, reduction in job responsibilities, reassignment to work under a less experienced or less qualified supervisor, badgering, harassment, or humiliation

calculated to encourage her to quit. To prove constructive discharge, the employee has to show that a reasonable person in her shoes would quit under the same circumstances.

The court noted that although the employee must prove constructive discharge to win her case under those facts, she doesn't have to prove that the employer imposed intolerable working conditions with the specific intent of forcing her to quit. If she proves that intent, however, it would be an aggravating factor used to support her claim. Courts typically require a greater degree of bad conduct to prove constructive discharge claims than that required to prove hostile environment claims.

The HR leader complained that the lower court hadn't considered the evidence showing the company's intent to remove her from her position, either by firing her or forcing her to quit. She argued that even without proof of the company's intent, she had produced enough evidence to show that it created a work environment designed specifically to set her up for termination or to force her to quit. Specifically, she claimed the company had fabricated deficiencies in her work performance, set an overly strict performance plan for her, threatened to fire her if she didn't meet her goals, micromanaged her, excluded her from HR department meetings, and ridiculed her in front of co-workers. The company responded that the lower court was correct in excluding certain evidence of its actions and also in determining that its actions wouldn't have caused a reasonable employee in the same situation to quit.

The appeals court decided that the lower court was wrong in not considering evidence of the company's actions that were allegedly designed to get rid of the HR leader. Next, the appeals court boiled down the main issue to whether a reasonable employee with similar information about what happened while she was on leave and who experienced what she did upon her return to work would've been compelled to quit. Considering all the evidence, the court said no — a reasonable employee in the same situation wouldn't have quit.

The court explained that while the HR leader may have been embarrassed by the plant manager's comment and her co-workers' response when she arrived late for a meeting, that treatment isn't the kind of badgering or harassment that would cause a reasonable employee to quit. Likewise, the court pointed out that having your work micromanaged may be unpleasant, but it doesn't rise to the degree of harassment necessary to prove constructive discharge. Finally, the court said that a reasonable employee who genuinely felt her working conditions were intolerable would've tried to work out her concerns before choosing to quit just two weeks after returning to work.

Therefore, the appeals court determined that the lower court was correct in granting the company's request to dismiss the case. Haley v. Alliance Compressor LLC, 2004 U.S. App. LEXIS 24071 (5th Cir. 2004).

Treat employees returning from leave just like anyone else

The moral of this story is to treat your employees fairly and consistently. If an employee has a performance problem, let her know about it regardless of whether she has requested or

taken FMLA leave. Of course, you should never treat your employees in an abusive or disrespectful manner, but if deficiencies need to be addressed, do it regardless of the timing.

As always, if you're going to take action against someone because of performance issues, make sure her problems are documented and that you have enough specific factual support for your conclusion. Also, talk with her first about the areas in which she needs to improve and give her a chance to do better. If you take those steps and properly document them, your actions are less likely to be seen as retaliatory.

Find out more about proper disciplinary procedures in the subscribers' area of HRhero.com, the website for Louisiana Employment Law Letter. You have access to an HR Executive Special Report titled "How to Discipline and Document Employee Behavior." Just log in and scroll down to the link for all the Special Report titles. Need help? Call customer service at (800) 274-6774.