

## FMLA Leave Is Not The Time To Reevaluate Employee's Position

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An employee's extended FMLA leave can often reveal interesting business realities. Perhaps the employee wasn't performing as well as you previously thought. Or maybe the work can easily be done by others. Despite what you learn, reevaluating the employee's position while he or she is out on leave is risky business.

### When Leave Opens Your Eyes

A well-performing employee is severely injured in a car accident. You provide time off for his serious health condition under the Family and Medical Leave Act (FMLA). However, while he is out on leave, you decide that his department functions just fine (or better!) without him. Perhaps you realize that his position really isn't needed at all. What can you do? May you eliminate his position? Does it matter that you had considered restructuring his position prior to his leave? The Tenth Circuit Court of Appeals (whose decisions apply to Wyoming, Colorado, Utah, New Mexico, Kansas and Oklahoma) addressed this scenario, offering insight into how to address these difficult business decisions. [Janczak v. Tulsa Winch, Inc.](#), No. 14-5071 (10th Cir. July 20, 2015).

### FMLA Job Restoration

The FMLA provides unpaid, job-protected leave for certain qualifying reasons, including a serious health condition that makes the employee unable to perform the functions of his or her position. When an employee returns from FMLA leave, he or she must be returned to the same job or an equivalent job that is virtually identical to the original job in terms of pay, benefits, shift, location and other conditions.

Employers can find themselves liable for violating the FMLA if they interfere with an employee's exercise of his or her FMLA rights or otherwise deny the rights, benefits or protections provided under the FMLA. Employers also risk an FMLA claim if they retaliate against an employee who has taken FMLA leave.

### Interference Claims

Does the FMLA prevent you from taking *any* adverse employment actions that affect an employee who went out on FMLA leave? What if the employee was earmarked for a demotion or termination prior to going out on leave? Or perhaps your company loses a big contract while the employee is out on leave, necessitating a reduction in force. Will you be liable then?

To establish an FMLA interference claim, the employee must show three things: (1) the employee was entitled to FMLA leave; (2) that the employer took some adverse action that interfered with the employee's right to take FMLA leave; and (3) the employer's action was related to the exercise or attempted exercise of the employee's FMLA rights. An employer defending against an interference claim has the burden of proving that it would have taken the adverse employment action regardless of the employee's FMLA leave.

### Case In Point

In the recent Tenth Circuit case, Paul Janczak had served as Tulsa Winch's General Manager of its Canadian operation for two years before he needed to use FMLA leave to recover from a vehicle accident. At the start of



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his leave, company leadership did not tell Janczak that his position might be eliminated and in fact, had recently indicated that it was looking forward to seeing him demonstrate his leadership skills after the departure of Janczak's boss. Tulsa Winch's president wrote an email stating that he planned to "further evaluate Paul's ability to provide the necessary leadership" after his return from FMLA leave. He also announced that two new hires would report directly to the General Manager in Canada (suggesting the GM position would continue to exist) and that Janczak would likely return to work and be able to travel that September.

The company claimed, however, that it had already begun discussing whether there was a need for a General Manager in Canada prior to Janczak's leave and that it came to the decision to eliminate the position and terminate his employment while he was still out on leave. It pointed to its development of a matrix reporting structure that allowed most of the Canadian department heads to report directly to the executives at corporate headquarters in Oklahoma. Though an email from the company's director of human resources identified "supporting Paul (upon his return)" as an agenda item, other meeting notes included entries such as "Rowland as next GM," "Spurgeon vs Janczak," "phase PZ out," and "what is plan for Paul - eliminate position."

Tulsa Winch terminated Janczak immediately upon his return from FMLA leave. It also fired its longtime Canadian Controller, due to the matrix restructuring.

Janczak filed both interference and retaliation claims against Tulsa Winch. The company argued that it would have fired Janczak even if he had not taken FMLA leave so Janczak's claims must fail. The district court in Oklahoma agreed, granting summary judgment to Tulsa Winch. Janczak appealed to the Tenth Circuit Court of Appeals which reversed on his interference claim, finding that a reasonable jury could find that Tulsa Winch interfered with Janczak's FMLA leave.

## **Contemplating Adverse Action Not Enough**

The Tenth Circuit made it clear that simply considering the elimination of Janczak's GM position before he took FMLA leave was not sufficient to permit summary judgment. Instead, to avoid a trial on the interference claim, the employer needs to show that termination would certainly have occurred regardless of the leave.

Circumstances where employers have successfully established that the company would have definitively taken the adverse employment action regardless of the employee's request for FMLA leave include:

- employee failed to comply with a direct and legitimate order from her supervisors;
- overwhelming evidence of performance issues that predated the leave;
- employee who had repeatedly been tardy and did not comply with absence policy on the date she was terminated;
- employee who, prior to leave, had been tardy, absent from her desk and failed to timely pay invoices or update a list of services received from vendors; and
- the decision to institute a reduction in force had already been made before the employee took leave.

Proving that these decisions were unrelated to the employee's leave requires that the evidence be well documented and undisputed. As stated in the court's opinion, the question is not whether a reasonable jury could find in favor of the employer, "but rather whether the evidence is so one-sided that submission to a jury is not required." That means that if the evidence supporting the employer's claim that the employee was fired for reasons unrelated to the leave is disputed or shows that the company was merely uncertain about the employee's future, the interference claim will not be dismissed at the summary judgment stage and instead, will go to a jury to decide.

In Janczak's case, the Tenth Circuit found that there was conflicting evidence as to when the decision was made to terminate him, concluding that a jury could determine that the decision to eliminate Janczak's position was related to his medical condition and his exercise of FMLA leave. The court stated:

Though taking advantage of Janczak's absence to reevaluate the value of his contributions to the company might appear a prudent economic decision in the abstract, protecting ill or caregiving employees from the effects of such a decision is precisely the purpose of the FMLA.

## **Retaliation Claim Failed Where Employee Not Restored to Job**

The Tenth Circuit rejected Janczak's retaliation claim, finding that he failed to show that Tulsa Winch's reasons for terminating him (*i.e.*, the general reorganization of managerial responsibilities) was pretext for retaliation based on his taking FMLA leave. The court noted that in a typical FMLA retaliation claim, the employee has been restored

to his or her prior employment status and then suffers an adverse employment action based on incidents after the return to work. Here, Janczak was never restored to his prior employment status, leaving the court to conclude that it fits into an interference theory rather than a retaliation theory.

To further explain the difference between FMLA interference and retaliation claims, the court said this:

Resolving the interference claim involves a fundamentally causal inquiry: whether Janczak's taking FMLA leave was causally connected to his termination. In contrast, resolving the retaliation claim involves an inquiry into motivation: whether [Tulsa Winch's] proffered rationale for terminating Janczak was mere pretext for its true, retaliatory motivation. Though causation and motivation frequently align, the difference between interference and retaliation claims illustrates that such alignment is not always necessary.

### **Practical Lessons Learned**

Deciding to impose an adverse employment action on an employee who has exercised their FMLA rights is fraught with potential risk of liability. But you should not feel hamstrung to keep an employee who would have been terminated had he or she not taken FMLA leave.

Before taking such action, talk to the decision-makers to ensure everyone is on the same page about the reasons for the termination. Ask the tough questions, including whether you would indeed make the same decision if the employee had not gone out on leave. Make sure you are treating this employee the same as other similarly situated employees who have not taken FMLA leave. And review your documentation to make sure it supports your decision. Remember, merely contemplating an action, such as eliminating the employee's position or terminating for poor performance, prior to the employee's leave will not be sufficient to establish that you did not interfere with the employee's FMLA rights, sending the claim to a jury.

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