

Third Circuit Says “Last Call” for Employee Terminated After Caught Drinking While on FMLA “Bed Rest”

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On January 31, 2017, the United States Court of Appeals for the Third Circuit joined the Seventh, Eighth and Tenth Circuits in holding that an employer’s honest belief that its employee was misusing FMLA leave is enough to defeat an FMLA retaliation claim. The court’s opinion in *Capps v. Mondelez Global, LLC* also serves as a reminder to employers that an employee’s request for intermittent FMLA leave may also trigger the employer’s obligation to engage in the interactive process with the employee under the ADA.

In *Capps*, the employee suffered from periodic flare-ups of severe pain in connection with his medical condition, Avascular Necrosis, for which he was certified to take intermittent FMLA leave. According to the employee’s healthcare certification form, when he experiences flare-ups resulting from his condition, he “requires full bedrest.”

The employee was scheduled to work on February 14, 2013, but called his employer that morning to say he would be late to work due to leg pain. Later that day, he called again to say that he would be taking the full day as FMLA leave because his leg pain had not subsided. However, by the employee’s own admission, at approximately 6:00 p.m. that evening, he drove to a local pub, where he drank three beers and three shots of alcohol with his friends. Thereafter, the employee attempted to drive home, but was stopped by police and arrested for being under the influence of alcohol. He was released from jail the following morning, February 15, 2013. Although he was scheduled to work at 1:00 p.m. on the afternoon of February 15th, he once again called his employer and said that he would be using FMLA leave due to leg pain.

Several months later, the company learned that the employee had been convicted of a DUI after reading about the conviction in a local newspaper. The company began to investigate the dates of the employee’s arrest and conviction, and discovered that the employee’s arrest date and court dates coincided with days he had taken intermittent FMLA leave. Although the employee disputed any suggestion that he misused his FMLA leave and even provided the company with notes from his physician and attorney which purportedly corroborated his need for leave, the company nevertheless terminated his employment for the employee’s violation of the company’s FMLA policy and Dishonest Acts policy. Thereafter, the employee filed claims of FMLA interference and retaliation, in addition to violations of the ADA.

In affirming the District Court’s grant of summary judgment to the employer on the employee’s FMLA retaliation claim, the Third Circuit relied upon evidence provided by the employer which established that it held an honest belief that the employee had misused his FMLA leave in violation of company policy, noting that the Seventh, Eighth, and Tenth Circuits have previously taken similar approaches. The court found that the employee was unable to establish that the employer had a retaliatory *intent* – a necessary element of an FMLA retaliation claim — particularly where there was no evidence that any of the employee’s requests for FMLA leave were denied or that he was prohibited from returning to work after taking approved leave. The court also affirmed summary judgment in favor of the company on the employee’s FMLA interference claim because the employee could not show that he was denied a benefit to which he was entitled under the FMLA.

This case should provide some comfort to employers who feel that their hands are tied when confronted with



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suspicious that employees are abusing intermittent leave. However, it also underscores the importance of policies which provide that employees may be disciplined or terminated as a result of the submission of false information.

This case also serves as a reminder for employers that under certain circumstances, a request for FMLA leave may also qualify as a request for a reasonable accommodation under the ADA. In *Capps*, the court found that the employee's ADA claim failed because even assuming that his request for FMLA leave constituted a request for a reasonable accommodation under the ADA (a question the court ultimately declined to answer), he still received the accommodation he had asked for, *i.e.*, additional leave. However, employers are encouraged to consider engaging in the interactive process with respect to employees who request leave (intermittent or otherwise) under the FMLA.

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