

## When Firing A Sympathetic Employee - Circumstances Matter A Lot

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The recent case of *Carroll v. Comprehensive Women's Health* illustrates the importance of circumstances and perception when terminating a "sympathetic" employee. Indeed the opinion reads like a case study of facts and circumstances that are unfavorable for the employer. And those "bad" facts are what the court focused in on - rather than evidence that was submitted - in refusing to dismiss the plaintiff's disability discrimination claims, and thus permitting the case to proceed to trial.

In this case, an employee in the center's medical records department alleged that she was terminated because during the prior year or so she required medical leave for breast cancer treatment. The employer denied that the cancer or cancer treatment played a role in the termination, instead claiming that the employee was terminated for poor performance and insubordination (after engaging in a shouting match with her direct supervisor). Additionally, the employer argued that the individuals who made the termination decision - the physician owners of the company - had no knowledge of plaintiff's cancer (so plaintiff's cancer could not have been the reason for the termination).

Supporting the employer's defense, the decision makers testified that they did not know of the cancer before the termination, the employee admitted never personally telling the decision makers about her cancer, and she also did not present any witness that testified they personally told the decision makers about the plaintiff's cancer (which was in remission at the time of her termination). Furthermore, the employee admitted that the employer provided "all the leave she requested for cancer treatment and procedures."

Notwithstanding this evidence, the court "hypothesized" that under the "totality of the circumstances" the employee's supervisor *could* have become frustrated with employee's medical leave and disability, *could* have used the shouting/insubordination as a pretext for discrimination and that the decision makers *could* have had knowledge of the employee's cancer before the termination.

To be candid, the court engaged in a lot of supposition, and did so because it clearly did not like some of the circumstances surrounding the termination, including:

- The plaintiff was a 13-year employee who had never previously been disciplined for insubordination and had a history of performing her job duties adequately
- The employer had a progressive discipline policy, which provided for counseling as the first step but was not followed in this case
- The employer medical practice had a small workforce employing only about 40 to 50 employees, all of whom the decision makers knew by name
- The employee had personally told 13 co-workers (25% of workforce) about her breast cancer
- The employee had taken more than 12 weeks of medical leave



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- A supervisor had told at least one other employee about employee's cancer
- The employee was terminated one day after she requested medical leave for genetic testing related to her cancer

The takeaway is that circumstances surrounding the termination of sympathetic employees can matter a lot. Therefore, employers should thoroughly analyze how the circumstances could be perceived to effectively evaluate litigation risk – and not rely exclusively on their version of the facts. Sadly, perception can win over truth in some circumstances.

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