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FMLA Does Not Trump Common Sense

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Common Sense

The situation is a familiar one to many employers: on the cusp of termination, an under-performing employee suddenly takes FMLA leave. What then? Do we fire the employee upon returning from FMLA leave? Doesn't that look bad?

The short answer is "Yes." It looks bad. At the very least, it raises eyebrows. But that does not mean the tough decision should not be made.

Earlier this month, a federal judge in Tennessee issued what appears to be a reasonable, even-handed decision in a case involving an employee who was fired from her job right after she returned from FMLA leave.

Judge Todd Campbell (interestingly, a President Bill Clinton appointee who had worked as Counsel to the former Vice President, Al Gore) granted summary judgment to the employer on all of the claims brought by the discharged employee under the FMLA and Americans with Disabilities Act.

Among the Judge's conclusions is that "[a] lthough temporal proximity is a factor to be considered, the Court finds that Plaintiff's first day back at work was the first time Defendant's decision could be relayed to her." *See Donald v. Sybra, Inc.* , 667 F.3d 757, 763 (6th Cir. 2012).

If your business or practice operates within the Sixth Circuit (Tennessee, Kentucky, Michigan, Ohio), this opinion is worth a review. Judge Campbell cites recent Sixth Circuit case law and clearly articulates other reasonable findings:

> 1. The law in this Circuit is clear that temporal proximity cannot be the sole basis for finding pretext. Donald, 667 F.3d 757, 763.
>
> 2. A reason cannot be pretext for retaliation unless it is shown both that the reason was false and that retaliation was the real reason. Seeger v. *Cincinnati Bell Telephone Co., LLC*, 681 F.3d 274, 285 (6th Cir. 2012).
>
> 3. Plaintiff argues with the facts underlying her firing, but the law does not require that the employer's decision-making be optimal or leave no stone unturned. *Seeger*, 681 F.3d at 285.
>
> 4. Plaintiff may show pretext by demonstrating that Defendant's reason (1) has no basis in fact; (2) did not actually motivate the action; or (3) was insufficient to warrant the action. *Id*.
>
> 5. To the extent that the June 3, 2010 document appears to state that

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> violation of the attendance policy was the reason for her termination, Plaintiff may have created a factual issue. The inquiry does not end here, however. The factual issue must be material.

In this particular case, the aggrieved plaintiff had a history of receiving oral and written warnings regarding violations of the company's policies. Her discharge cannot and should not be saved by taking FMLA and the Court agreed.

For those interested in the details, the case is *Travers v Cellco Partnership d/b/a Verizon Wireless* , Case No. 3-12-061 in U.S. District Court for the Middle District of Tennessee.