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Lessons Learned: FMLA-Protected Employees Can Be Disciplined In The Event Of Misconduct

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Absent a contractual obligation to the contrary, common sense dictates that if an employee lies about the reason for an absence, an employer **can** terminate the employee for the lie. But, what if an employer (perhaps mistakenly) believes the reason for the absence was a lie, when in fact the reason for the absence (allegedly) is for an FMLA-protected reason? According to the U.S. Court of Appeals for the Third Circuit in *Frederick Capps v. Mondelez Global LLC*, that's ok, too, so long as the employer honestly believed the reason for taking the leave was a lie. Keys to the court's decision in *Capps* were:

- The existence of a company policy that prohibited dishonest acts; a prohibition that was repeated in the company's FMLA policy, which specifically stated that submission of false information or the fraudulent use of FMLA could result in discipline up to and including discharge
- The company's investigation into whether the employee had submitted false documentation in support of his request for intermittent FMLA and whether the employee had used FMLA leave for an impermissible purpose
- The company's honest belief – based on its investigation – that the documentation the employee submitted, which the company found suspicious, did not support the employee's claim for intermittent FMLA leave
- The company's record of approving FMLA for the employee in the past

So what are the lessons learned? If your company's FMLA policy does not specify that discipline may result from submitting false documentation or from fraudulently using FMLA, you should consider updating your policy. And, you shouldn't be afraid to hold an employee accountable for policy violations – even if the employee has engaged in protected activity – so long as you honestly (and reasonably) believe that the employee violated the policy. On this latter lesson learned, there are caveats — the honest belief in *Capps* was based on an investigation (that included interviewing the employee and giving him a chance to submit documentation supporting his need to take off for an FMLA-qualifying reason) and there was no evidence of unfair application of the employer's policy. A final word: In reaching its conclusion, the Third Circuit relied on decisions from the U.S. Court of Appeals for the Seventh, Eight and Tenth Circuits. Thus, these lessons learned not only apply to employers in the Third Circuit (Delaware, New Jersey, Pennsylvania and

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the U.S. Virgin Islands), but also to employers in the Seventh Circuit (Illinois, Indiana and Wisconsin), the Eighth Circuit (Arkansas, Iowa, Minnesota, Missouri, Nebraska, North Dakota and South Dakota), and the Tenth Circuit (Colorado, Kansas, Oklahoma, New Mexico, Utah and Wyoming).