

FMLA Insights

Guidance & Solutions for Employers

Failing to Return Employee's Phone Calls May Be FMLA Retaliation

By Jeff Nowak on September 28, 2011



During a [webinar](#) I conducted last month with the EEOC's John Hendrickson regarding "leave" as a reasonable accommodation under the ADA, I pleaded with, begged, and cajoled employers to maintain regular contact with an employee while he or she is on FMLA leave. Here is another reason to heed this advice - failing to do so may increase your risk of an FMLA retaliation claim.

As Eric Meyer reports in [The Employer Handbook](#) blog, a federal court in Pennsylvania found that an employer's failure to return an employee's telephone calls while she was on FMLA leave is evidence of retaliation. In [Hofferica v. St. Mary Medical Center](#), the plaintiff was a registered nurse who was approved for intermittent FMLA leave for an unusual medical condition that involved tinnitus, hearing loss and vertigo.

In September 2008, she took extended FMLA leave to undergo treatment for the condition. She expected to return by November 6, 2008. The employee claimed that, during her leave, she and her husband regularly provided her direct supervisor with leave updates. However, her supervisor often failed to return the calls. In early November, she provided a return to work certification clearing her return for November 13. She also contacted her supervisor to ask for a "modest" extension through November 13, but the supervisor again did not return the call. Instead, the Medical Center sent the employee a letter informing her that her employment had been terminated because she failed to return to work on November 6 when her FMLA leave allotment had been exhausted.

A really bad move.

Not surprisingly, the employee filed suit claiming, among other things, that the Medical Center retaliated against her for taking FMLA leave. This claim will now make its way to a jury. In refusing to dismiss the employee's retaliation claim, the trial court found that the supervisor's failure to return phone calls was evidence of "an antagonistic attitude toward the employee, particularly where - as here - such refusal began after the employee initiated FMLA leave, and continued despite regular communications from the employee." As such, it could be used as evidence of retaliation. A scary result for employers, but the decision provides plenty of lessons for employers.

Insights for Employers

1. As this decision makes clear, it is imperative that employers maintain contact with employees on FMLA leave. Why go weeks or months without talking with an employee on leave? If you are communicating with them for the first time on the eve of their return to work, you are only

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inviting trouble. Your FMLA policy and forms should make clear that you expect the employee to check in at appropriate intervals, and that you will be contacting them, too!

2. In last month's webinar, we covered a fact pattern very similar to this case to help employers understand their ADA obligations when an employee's FMLA leave expires. Where FMLA ends, employers must be prepared to analyze requests for additional leave under the parameters of the ADA. Click [here](#) for more guidance on this point.
3. Finally, don't let the supervisor off the hook -- issue discipline if necessary (if they failed to manage this situation properly) and provide additional training. In Hofferica's case, it appears as though the supervisor completely dropped the ball in (not) communicating with the employee. Training on FMLA responsibilities is critical. And for this supervisor, might some additional training on telephone etiquette be in order?

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