

Family Medical Leave Act Decisions

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Denial of Leave Request following Exhaustion of FMLA Is Not Discriminatory

Hasenwinkel v. Mosaic et al., --- F.3d ---, 2015 WL 9466276 (8th Cir. 2015): Plaintiff sued her former employer, a group-living and nursing-care facility, for interfering with her rights under the Family and Medical Leave Act (FMLA) by denying her benefits to which she was entitled and discriminating against her for taking FMLA. The Eighth Circuit affirmed summary judgment on all claims under the FMLA claiming Plaintiff was never denied any FMLA to which she was entitled and did not suffer any adverse action as a result of the employer's alleged discrimination.

Plaintiff was hired in 2007 and worked as a registered nurse until her termination in July 2012. During her employment, Plaintiff obtained leave under the FMLA on seven occasions. The Court found the employer never rejected an explicit request for leave but Plaintiff alleged that on one occasion she was forced to return to work from FMLA and was punished for taking it. Plaintiff also alleged she received three formal corrective actions that were issued in retaliation for taking FMLA. One of the corrective actions involved a one-month suspension, which was later reduced to a written warning and the employer reimbursed her the month's pay.

In November 2011, Plaintiff took FMLA to undergo neck surgery. Plaintiff exhausted her existing FMLA, an additional 12 weeks the employer provided (because the employer changed how leave was calculated), and another 90 days medical leave but never returned to work. Plaintiff alleged she did not return to work due to the hostile environment created by the employer.

In affirming the lower court's dismissal on summary judgment, the Court of Appeals rejected Plaintiff's claim the employer violated her FMLA rights by denying her request for leave because at the time of her request Plaintiff had already exhausted her FMLA benefits. In rejecting this argument, the Court made a point that the employer had provided Plaintiff three times the amount of leave required by law.

The Court also found Plaintiff's discrimination claim failed because the employer did not subject Plaintiff to any adverse action. Plaintiff claimed three adverse acts. The Court dismissed Plaintiff's first claimed adverse action- termination- because she was unable to work. While Plaintiff alleged she was unable to return to work because the employer had created a hostile environment, the Court held even if that was true, she was physically unable to work when her leave expired. Therefore, while termination is undeniably an adverse act an employer may lawfully terminate an employee, even after FMLA leave, when the employee is unable to perform the essential functions of the position. Next, the Court dismissed Plaintiff's claim the unpaid suspension was adverse because the employer ultimately reimbursed her for the month's

pay. The Court of Appeals distinguished Supreme Court precedent in Title VII cases that hold a suspension with back pay can still be adverse from Plaintiff's case because the FMLA, unlike Title VII, requires the employee show actual monetary loss to recover. Since Plaintiff admitted she was made whole when the employer reimbursed her, the Court held Plaintiff did not suffer any tangible loss as result of the suspension. Finally, the Court dismissed Plaintiff's claim being treated unfairly and ostracized by her coworkers was sufficiently severe to deter a reasonable employee from exercising their FMLA rights.

Light Duty Work Does Not Interfere with Leave if Not a Condition of Employment

Madonna Massey-Diez v. University of Iowa Community Medical Services, Inc., No. 15-2924, 2016 WL 3514019 (8th Cir. June 27, 2016): The University of Iowa Community Medical Services, Inc. ("UICMS") hired Madonna Massey-Diez as a physician assistant ("PA") in September 2009. In 2011, UICMS adopted "EPIC," a software medical records management program, to chart patient records. UICMS encouraged prompt charting through two internal policies: nonbinding "Standards of Excellence" and an enforceable "Completion of Documentation Policy." The Standards of Excellence required PAs to dictate patient information within 24 hours of a visit and then review a transcription of the records within the next 48 hours. The Documentation Policy, which UICMS enforced through a progressive disciplinary procedure, penalized PAs who held thirty or more incomplete records that were, on average, 14 or more days old.

Massey-Diez did not promptly update records into EPIC. At one point, Massey-Diez had more than 200 overdue records. UICMS initiated disciplinary warnings against Massey-Diez and issued a "below expectations" rating on her performance evaluation. On March 21, 2013, Massey-Diez met with her supervisors and committed to updating her charts within one week and remaining current for 90 days.

On June 17, 2013, Massey-Diez broke her foot and took full-time FMLA leave for a serious medical condition until June 30, 2013. Massey-Diez continued to use FMLA leave intermittently through July 8, 2013. While on leave, UICMS asked Massey-Diez to manage two EPIC inboxes from home. Massey-Diez did not object to UICMS' request. Although no one told Massey-Diez that she was required to maintain EPIC records, Massey-Diez's supervising physician, Dr. Powers, sent Massey-Diez text messages in the form of directives regarding maintenance of EPIC records.

Despite these directives, Massey-Diez struggled to remain timely with her EPIC entries while on leave, and UICMS decided not to renew Massey-Diez's contract. UICMS sent Massey-Diez a letter on July 9, 2013, the day after she returned to work, informing her that her contract would not be renewed. Massey-Diez brought three claims against UICMS, alleging (1) interference with the exercise of her FMLA rights, (2) discrimination against Massey-Diez for exercising FMLA rights, and (3) unpaid wages for work done during FMLA leave. The United States District Court for the Southern District of Iowa granted UICMS' motion for summary judgment, and Massey-Diez appealed to the Eighth Circuit.

Employers may not “interfere with, restrain, or deny the exercise of or the attempt to exercise,” an employee’s FMLA rights. The FMLA, however, does not prohibit “an employee’s voluntary and uncoerced acceptance (not as a condition of employment) of a light duty assignment while recovering from a serious health condition.”

Regarding Massey-Diez’s interference claim, the court drew a distinction between “nondisruptive communications such as short phone calls” and “requiring the employee to complete work-related tasks.” The court determined that Massey-Diez never expressed any reservations about maintaining EPIC records during her FMLA leave. Furthermore, the court found that the record did not indicate that Dr. Powers’ directives were coercive. Although the court found that UICMS “approached the line of interference” with an employee’s FMLA leave, Massey-Diez failed to prove that UICMS’s requests were a condition of her employment or that her compliance was involuntary. The court, therefore, upheld summary judgment for UICMS on Massey-Diez’s interference claim.

Massey-Diez also argued that UICMS discriminated against her for using FMLA leave when it decided not to renew her contract. The court found that there was no direct evidence of discrimination, because there were no blatant statements or actions that indicated evidence of direct discrimination. The court, therefore, considered Massey-Diez’s discrimination claim based on circumstantial evidence under the *McDonnell Douglas* burden-shifting framework.

UICMS argued that Massey-Diez’s longstanding charting delinquencies served as a legitimate, nondiscriminatory basis to not renew her contract. As proof of discrimination, however, Massey-Diez pointed to the close temporal relationship between Massey-Diez’s use of FMLA leave and the decision to not renew her contract. The court rejected Massey-Diez’s argument and concluded that UICMS’ concerns about Massey-Diez’s charting—which began before she took FMLA leave—undercut the significance of the temporal relationship between Massey-Diez’s use of FMLA leave and UICMS’ adverse employment action. The court, therefore, upheld summary judgment for UICMS.

Liquidated Damages Not Limited by After-Acquired Evidence

Jamie Smith v. AS America, Inc., No. 15-1183, 2016 WL 3769322 (8th Cir. July 14, 2016): Thomas Smith worked for American Standard Brands (ASB) in Nevada, Missouri, performing labor that involved lifting bathroom fixtures that weighed an average of 25-50 pounds. ASB maintained a strict attendance policy and terminated employees with eight absences in any twelve-month period. In January 2011, Smith missed three days of work due to sinusitis and lower back pain. Smith went to an urgent care clinic, where he received muscle relaxants and was advised to pursue physical therapy. Smith applied for leave under the Family Medical Leave Act and missed three additional days of work.

On February 5, 2011, Smith left work early due to back pain. Smith requested leave for February 6 and 7, expecting that his FMLA leave would cover his absences. During his time off, Smith went to the urgent care clinic, which advised him to continue medical treatment and physical therapy. On February 8, 2011, Smith went to the ASB plant to deliver a note from the urgent care clinic. Human Resources denied Smith's FMLA request, docked Smith three absences, and fired Smith for violating the company's attendance policy. Smith submitted a new FMLA application on February 11, 2011, but ASB denied his request and refused reinstatement.

During discovery, ASB learned that Smith was arrested and jailed on July 13, 2011. Although the parties disputed the number of days Smith spent in jail, the court ultimately found that he was not released until July 20, 2011. The district court reasoned that even if ASB did not terminate Smith on February 8, 2011, the company would have fired him for violating the company's attendance policy while in jail. After a bench trial, relying on this after-acquired evidence, the court awarded Smith \$13,865.84 in lost pay until July 20, 2011, the same in liquidated damages, and \$159,944.66 in attorney's fees. Both parties appealed. Smith died on March 3, 2014, and his wife, Jamie Smith, took over as the plaintiff.

ASB argued that Smith did not have a "serious health condition" that qualified for FMLA leave. The FMLA defines "serious health condition" as "an illness, injury, impairment or physical or mental condition that involves...continuing treatment by a health care provider." 29 U.S.C. § 2611(11). Although ASB argued that Smith's back condition was not chronic, because Smith only received medical treatment two times, the court noted that FMLA regulations only require "serious health conditions" to involve two visits per year to a health care provider. 29 C.F.R. § 825.115(c)(1). Because Smith went to the urgent care clinic on two occasions, the 8th Circuit found that the court did not err in finding that his medical condition qualified for FMLA leave.

ASB also argued that the court abused its discretion when it awarded liquidated damages to Smith, because Smith did not show that ASB willfully violated the FMLA. The court, however, noted that liquidated damages are mandatory unless the employer meets its burden to show that it acted in good faith. The court found that ASB did not act in good faith and affirmed an award of liquidated damages to Smith.

Furthermore, ASB argued that Smith was not entitled to attorney's fees, because he did not request a specific amount of attorney's fees during discovery. The 8th Circuit rejected ASB's argument, because Federal Rule of Civil Procedure 26(a) does not require a computation of

attorney's fees during discovery. In the alternative, ASB argued that Smith should be judicially estopped from claiming more than \$13,268.32 in attorney's fees based on Smith's valuation of the lawsuit in probate court, which indicated that his claim was only worth \$41,000. Judicial estoppel prevents parties from prevailing with an argument in one phase of a case, then relying on a contradictory argument to prevail in another phase. The 8th Circuit rejected ASB's judicial estoppel argument, because the probate filing was not a "purposely inaccurate document that misled either court or led to an unfair advantage or an unfair detriment to either party." Lastly, ASB argued that attorney's fees should be limited to the time after Smith's death, because no one filed a creditor's claim for the fees they incurred through Smith's death on March 3, 2014. Again, the 8th Circuit rejected ASB's argument and upheld the district court's award of attorney's fees, because such limitations have no bearing in Smith's federal lawsuit.

On cross-appeal, Jamie Smith argued that after-acquired evidence did not limit recovery, because Smith was not in jail long enough to violate ASB's attendance policy. To limit damages on the basis of after-acquired evidence, the employer must show "that the wrongdoing was of such severity that the employee in fact would have been terminated on those grounds alone if the employer had known of it." The district court, in finding that Smith was released on July 20, 2011, relied on unauthenticated testimony. The 8th Circuit, however, found that the district court should have relied on other testimonial evidence that indicated Smith was released on July 19, 2011. As a result, the 8th Circuit vacated limitations on Smith's damages and remanded the case for further proceedings.

FMLA Interference for Failing to Calculate Mandatory Overtime Hours

Hernandez v. Bridgestone Ams. Tire Operations, LLC, No. 15-2042, 2016 WL 4136959 (8th Cir. Aug. 4, 2016): Lucas Hernandez worked as a tire builder for Bridgestone Americas Tire Operations, LLC (BATO). Hernandez was an hourly employee, who was overtime eligible. When overtime shifts were available, BATO posted a sign-up sheet to allow employees to volunteer for overtime. Employees selected for overtime were required to work a 12-hour shift. If an employee missed an overtime shift, then BATO deducted 12-hours from the employee's leave provided under the Family Medical Leave Act (FMLA).

Bridgestone maintained an attendance policy with a four-step progressive disciplinary procedure that involved counseling, written warnings, and termination. Between October 31, 2011, and July 15, 2012, Hernandez missed work 54 times, including 42 days that were approved under the FMLA. On July 10, 2012, Hernandez exhausted his FMLA leave. Hernandez, however, missed several more days for FMLA-qualifying purposes. But because these subsequent absences were categorized as "unexcused," rather than as part of Hernandez's exhausted FMLA leave, BATO terminated Hernandez.

Hernandez sued BATO, alleging that the company interfered with his rights under the FMLA. The United States District Court for the Southern District of Iowa ruled in favor of BATO on Hernandez's FMLA discrimination, retaliation, and harassment claims, but found for Hernandez on his FMLA interference claim. Specifically, the court held that absences for missed overtime shifts were not deductible from Hernandez's FMLA entitlement, because the overtime shifts were voluntary. A jury awarded Hernandez \$113,586 in attorney fees, which the district court reduced to \$76,318. BATO appealed the judgment for Hernandez, and Hernandez cross-appealed the district court's reduction of attorney fees.

Because federal regulations provide that "[v]oluntary overtime hours that an employee does not work due to an FMLA-qualifying reason may not be counted against the employee's FMLA leave entitlement," the 8th Circuit had to determine whether the overtime that Hernandez missed was voluntary or mandatory. 29 C.F.R. § 825.205(c). The 8th Circuit reasoned that although Hernandez's decision to sign-up for overtime was voluntary, it became mandatory after BATO selected Hernandez for the overtime position. The court focused on the fact that BATO disciplined employees for missing overtime shifts, just like missing regular shifts, as illustrating the mandatory nature of an employee's overtime. The 8th Circuit, therefore, disagreed with the district court and found that hours missed for FMLA-qualifying reasons were appropriately deducted from Hernandez's FMLA leave.

The 8th Circuit, nevertheless, affirmed judgment for Hernandez. Because Hernandez's overtime work was mandatory, the court found that Hernandez's overtime hours should have been included in the calculation of his total FMLA leave. BATO, however, did not consider overtime as part of its computation of employee FMLA leave. The court, therefore, held that BATO unlawfully interfered with Hernandez's FMLA rights by miscalculating his FMLA leave.

Concerning Hernandez's cross-appeal, the 8th Circuit held that the district court did not err in reducing the jury's determination of attorney fees. The court, however, did find that the district

court erred in excluding costs for computerized legal research from the calculation of Hernandez's attorney fees and remanded the issue to the district court.