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STATE COURT SLAMS EMPLOYER FOR VIOLATING FMLA

By H. Mark Adams

A Louisiana employer must pay over \$862,000 to an employee it fired while he was on paid medical leave. A Louisiana Court of Appeal ruled that the employer violated the Family and Medical Leave Act (FMLA) and awarded the employee \$127,417 in back pay, an equal amount in liquidated damages, \$525,529, for 18 years of front pay, and \$81,364 in attorneys fees.

The case involved an exemplary employee who was off work recovering from knee surgery. While on leave, the employee agreed to drive a truck to help out in a Red Cross disaster relief effort. A coworker saw the employee on a TV news show covering the disaster and reported him to the company. When the employee returned from leave several weeks later, he was fired for “lying” about his medical condition and his need to be off work. Apparently, the company thought that if he was well enough to drive a truck for the Red Cross, he was well enough to be at work.

The employee then filed suit in state court for wrongful discharge under the FMLA. The court found that the company violated the FMLA by firing the employee without following the FMLA procedure for getting second and third medical opinions when it had reason to doubt the opinion of the employee’s doctor.

This state court ruling is in direct conflict with federal court rulings that an employer does not have to follow the FMLA procedure for getting second and third medical opinions when it has direct evidence that an employee may have been untruthful about his need to be on leave. Under the federal court interpretations of the FMLA, when you have direct evidence that an employee is lying about his need to be on FMLA leave, the test is not whether the employee is actually lying, it’s whether you have a reasonable basis for believing he’s lying, i.e., whether you have a legitimate nondiscriminatory reason for firing the employee. The ruling also deviates from federal court rulings that typically limit front pay awards to only a few years, much less than the 18 years of front pay this Louisiana employer was ordered to pay.

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INCONSISTENT AND INADEQUATE DOCUMENTATION SENDS EMPLOYER TO TRIAL

By Charlotte S. Marquez and Jennifer L. Anderson

Many employers have a formal or informal process they follow when making and carrying out the decision to fire an employee. But is your process designed to minimize the possibility of employment discrimination lawsuits and liability? Do you even have such a process in place? When an employee violates a work rule, you should always look beyond the circumstances of the employee's immediate conduct to determine the appropriate disciplinary action, unless unique or particularly egregious circumstances require immediate discharge. The following case reminds us how important it is to be even-handed when you dole out discipline or fire an employee and to accurately document the grounds for discipline or discharge.

A popular seafood restaurant chain fired a Hispanic waitress for engaging in workplace misconduct. The waitress's manager prepared a contemporaneous report documenting two specific reasons for her discharge: (1) "she has been working behind the scenes attempting to lure fellow employees to leave [the restaurant]" and (2) "she is spreading rumors about a manager being fired for calling in sick." The alleged subterfuge and rumors weren't the waitress's first infractions, however. She'd received disciplinary reports on two previous occasions, *but they weren't mentioned in the documentation as the reasons for her discharge.*

Under every good plot, there's usually an even better subplot, and this case is no exception. A white restaurant employee had also allegedly offered to use her connections at a competing restaurant chain to obtain jobs for herself and her coworkers. The same manager who fired the Hispanic waitress for the two reasons stated above was aware of this white employee's conduct, but didn't take any action against her.

The Hispanic waitress sued her employer for national origin discrimination, claiming that she was fired in violation of Title VII of the Civil Rights Act of 1964. The trial court dismissed the waitress's case before trial, reasoning that the waitress couldn't show that the restaurant's reasons for discharging her were false or that the restaurant was really motivated by discriminatory intent. The waitress challenged the trial court's ruling in the United States Court of Appeal for the Fifth Circuit in New Orleans.

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To win her appeal, the waitress had to raise a question about or rebut each of the restaurant's stated reasons for firing her. In response to the first reason (i.e., that she conspired with others to "lure fellow employees to leave [the restaurant]"), the waitress pointed to the white restaurant employee who had engaged in similar conduct but, unlike her, was never disciplined in any way. Specifically, the waitress submitted sworn statements from two other restaurant employees who testified that the white employee had used her connections at a competing restaurant to obtain job offers for the restaurant's employees.

The restaurant, on the other hand, tried to distinguish the respective employees' misconduct. The restaurant argued that it was justified in treating the white employee more leniently because the Hispanic waitress's conduct was more damaging to the restaurant. According to the restaurant, the Hispanic waitress had "attempted to facilitate a coordinated departure of employees," whereas the white coworker had merely tried to help others get new jobs. Although several restaurant employees said they believed the waitress was planning to stage a "coordinated" walkout during a shift, the Fifth Circuit ruled that the restaurant couldn't rely on the employees' statements. The reason for the court's ruling in this regard is something every employer should know. *The court noted that the waitress's discharge report referred only to an attempt to "lure fellow employees to leave [the restaurant]," not to a "coordinated" walkout.* As a result, the court viewed the white employee's conduct to be *virtually identical* to the waitress's conduct. And, by showing that a similarly situated white employee was, arguably, treated more leniently than she was treated under nearly identical circumstances, the Hispanic waitress had effectively rebutted the restaurant's first nondiscriminatory reason for termination.

The waitress also raised a question about the restaurant's second reason for terminating her. In the discharge report, the restaurant accused the waitress of "spreading rumors about a manager being fired for calling in sick." The manager who fired the waitress and prepared the discharge report adamantly maintained that fellow coworkers had reported the rumor to him. However, the manager ultimately couldn't support his story. Additionally, the report failed to provide any details about the alleged rumor, such as the identity of the manager who had supposedly been terminated. The waitress offered evidence showing that the manager in question was not absent from work and was actually on duty the day that the waitress supposedly spread the rumor. Thus, the waitress rebutted the restaurant's second reason for her discharge by showing that the rumor-spreading allegation was, arguably, not the real reason she was fired.

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The restaurant also argued it had terminated the waitress in part because she had received two previous disciplinary reports (whereas the white employee hadn't received a single disciplinary report). Company policy allowed the restaurant to fire any employee who received two or more disciplinary reports. Thus, the restaurant argued it was justified in treating the waitress and her white coworker differently. The Fifth Circuit, however, rejected this argument because the restaurant did not rely on the waitress's disciplinary history in the report documenting her discharge. Thus, the Fifth Circuit reinstated the waitress's case. *Ramirez v. Landry's Seafood Inn & Oyster Bar*, 280 F.3d 576 (5th Cir. 2002).

Ask Yourself the Tough Questions and Tell It Like It Is

Before you fire an employee, ask yourself the following questions:

- Have I consistently and fairly applied the company's policies and procedures?
- Have any similarly situated employees behaved similarly and what were the consequences?
- Have I thoroughly investigated the incident and have I been objective and gathered all the facts?
- Is progressive discipline warranted under my company's policies and have I consistently followed that process under similar circumstances?
- Have I given the accused an opportunity to present her side of the story and followed up on any leads or conflicts that arose?
- Does the discipline match the infraction and am I being fair and objective?

Similarly situated employees, generally, are those who hold similar jobs at a comparable level in the organization, usually in the same department or under the same supervisor, and are subject to the same work rules and engage in the same conduct under nearly identical circumstances. Once you determine that employees are similarly situated, you need to ask yourself if you've treated them differently. For example, if you fire a white employee for stealing but merely issue a disciplinary action to a black coworker who stole a comparable amount of money, had the same supervisor, held a similar job at a comparable level in the organization, and was subject to the same work rules,

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you've likely opened yourself up to a race discrimination claim by the white employee. So, follow this type of protocol before you take an adverse employment action (i.e., refusal to hire, demotion, cut in pay, termination) to make sure you're treating similarly situated employees in an evenhanded fashion.

More important, this case teaches employers an important lesson about documentation. The restaurant probably had several solid grounds to discharge the Hispanic waitress. *The restaurant's manager, however, neglected to note the waitress's disciplinary history in her termination report and failed to accurately characterize the nature of her infraction (i.e., staging a coordinated walkout during a shift).* As a result, the Fifth Circuit did not consider the disciplinary record as a reason for the waitress's termination (despite the restaurant's claim to the contrary), and concluded that the Hispanic and white employees' infractions were similar for the purpose of the waitress's discrimination claim. This meant the difference between dismissal of the lawsuit and trial for the restaurant. If you choose to document the reasons for discharge in a report *and* you choose to craft those reasons in a specific rather than general fashion, your report must scrupulously articulate each and every reason you intend to rely on for the termination. If you don't, your hands will be tied, and you won't be able to rely on valid but undocumented grounds for discharge to avoid trial or, worse, liability.

Remember that these legal principles may change and vary widely in their application to specific factual circumstances. You should consult with counsel about your individual circumstances. For further information regarding these issues, contact:

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