

PUBLICATION

"Honest Belief" of FMLA Misuse Not Enough to Defeat FMLA Interference Claims

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Eddie Employee is an hourly employee of Company, Inc. Eddie notifies Sally Supervisor that he will undergo surgery, and will need continuous medical leave to recover. While out on leave, Eddie's co-workers, who are "friends" with him on social media, report to Sally that Eddie is posting photographs of him jet-skiing, dancing, and partying on a cruise to the Caribbean. To verify these reports, Sally logs onto her social media account, and sees these photographs. As a result, Sally terminates Eddie's employment. Does the Company face liability under the Family Medical Leave Act (FMLA)?

If Eddie admits that he did not use the requested leave to recover from his surgery as he previously told Sally, then the answer is most likely a resounding "no." The "general rule" is that FMLA interference claims can be defeated by showing that an employee did not take the leave "for its intended purpose." But what if Eddie denies that he misused FMLA leave? What if -- in a lawsuit against the Company -- Eddie alleges that the photographs Sally relied on were taken months before his FMLA leave? Assuming that Eddie is correct, is the Company shielded from FMLA liability because Sally held an honest belief that Eddie was misusing FMLA leave?

If Company is located within the Sixth Circuit's jurisdiction, (Kentucky, Michigan, Ohio, and Tennessee), then the answer is very likely "no." The Court of Appeals in the Third, Seventh, and Tenth circuits have held that an employer's honest belief that an employee is abusing FMLA leave defeats FMLA interference or retaliation claims, *even if that belief is mistaken*. Although the district courts in the Sixth Circuit apply the "honest belief" defense to FMLA *retaliation* claims, they are split as to the application of this defense to FMLA *interference* claims.

In 2013, the Sixth Circuit Court of Appeals expressly addressed this split among the district courts. Although, it did not rule directly on the issue, the Sixth Circuit reasoned that the honest belief doctrine does not fit neatly into the context of FMLA interference claims because such claims do not have "scienter requirement." That is, an employee does not have to prove an employer's intent to interfere with the employee's FMLA leave. Therefore, an employer's honest belief is irrelevant in a FMLA interference claim. The Sixth Circuit's Court of Appeals' reasoning on this issue is trickling down to the district courts. This past month, the U.S. District Court for the Northern District of Ohio stated that -- with respect to the honest belief defense -- "[t]he Sixth Circuit has not recognized its applicability to FMLA interference and this Court will not extend it to encompass such a claim." *Garlock v. Ohio Bell Telephone Co.*, (N.D. Ohio, Sept. 29, 2015). In that case, the employer argued that it had an honest belief that the employee was misusing FMLA leave. For that reason, the employer suspended the employee, who denied misusing his leave. Because the employer's decision was *partly* based on the employee's decision to take FMLA leave, the district court refused to dismiss the employee's FMLA interference claim. The district court did dismiss, however, the FMLA retaliation claim.

This is not to say that employers are left without any options in defending against interference claims filed in Sixth Circuit courts. An employer can still defeat an interference claim by presenting evidence that an employee was not entitled to the FMLA leave. For example, in Eddie's case above, the Company can still present evidence that Eddie was not undergoing surgery or recovering from a serious medical condition.

The Sixth Circuit's position on this issue affects employers who held an honest belief as to an employee's misuse of FMLA leave, but were ultimately incorrect. For this reason, employers should exercise caution in disciplining employees for suspected FMLA misuse. The following are some helpful tips keep in mind when dealing with suspected FMLA misuse:

1. Conduct an investigation. Many employers who suspect employees of misusing leave hire private investigators to conduct surveillance on employees during their leave.
2. Provide an opportunity for an employee to explain an apparent misuse of FMLA leave. In Eddie's example, Sally could have avoided her mistake had she given Eddie a chance to explain the photographs on his social media account.
3. Use FMLA protections against misuse. If medical certification appears questionable, the FMLA allows employers to require employees to be examined by a healthcare provider of the employer's choosing. (Note that an employer should pay the costs for such examination).
4. Preserve all documents, notes, and log entries regarding the employee's FMLA leave.