

PUBLICATION

Million Dollar Messaging Mistakes & FMLA Retaliation

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A recent decision from the Massachusetts Supreme Judicial Court, the highest court of Massachusetts, emphasizes the dangers to employers of taking employment actions based on outrage rather than reason. The Court accepted direct appellate review of a trial court award of \$1.3 million in damages for retaliatory termination in violation of the Family and Medical Leave Act (FMLA), the Americans with Disabilities Act (ADA), and a state law discrimination statute. A jury awarded the employee \$19,777 in back pay and \$300,000 in front pay for lost future income and benefits. In addition, the jury also awarded the employee \$200,000 for emotional distress, and \$715,385 in punitive damages. The trial court then awarded the employee \$208,443 in liquidated damages and \$605,690 in attorney's fees and costs. Following review of the award of damages, the trial court reduced the front pay award to \$188,666, but otherwise kept the other damages amounts the same, resulting in the \$1.3 million damage award. The Massachusetts Supreme Judicial Court affirmed the entire award of damages.

So what did the Court find persuasive in upholding such a large amount of punitive damages and liquidated damages? In this case, the plaintiff, a former Information Technology Manager for the defendant public utility company, had been a loyal employee for many years and received positive performance reviews. He informed his HR department that he was postponing a previously scheduled knee surgery to have a tumor removed from his right foot. His surgeon provided a medical certification informing the employer the manager would need between four and six weeks of FMLA leave following the surgery, would need to wear a medical boot, and then transition to weight-bearing activities. Following surgery, the employee informed the HR department he wanted to return to work early to avoid exhausting all of his allotted vacation time. The employer informed the IT manager he could not return early without a certification from his surgeon. The employee was unable to obtain the certification until his return to the surgeon several weeks later. When the employee discovered he would be unable to return from leave without exhausting his vacation time, he requested to be provided with "salary continuation" under the employer's salary continuation policy.

During the last few weeks of his FMLA leave, the employee went on a previously scheduled vacation to Mexico, a trip he took every year and that was scheduled well in advance. The employee stated at trial that he limited the activities in which he participated during the trip due to his recovery. When his paycheck did not reflect what he thought he should have received under the salary continuation policy, the employee emailed HR requesting a corrected paycheck and a copy of the policy so that he would not receive "any surprises" when he took additional FMLA leave for his anticipated knee surgery. The HR Director did not provide the employee with a copy of the requested policy, but forwarded the employee's email to an HR Manager stating, "is he serious?" to which the HR Manager replied, "OMG."

The same day as the email correspondence, the employer learned that the plaintiff employee had taken a vacation to Mexico during his FMLA leave. The HR Director launched an immediate investigation into the employee's activities while on leave. The company obtained video of the employee lifting luggage out of a car at the airport. The employee explained that he tried to return to work early, that he was wearing a boot while engaging in the questionable activities, and the activities were not inconsistent with the medical forms from his surgeon. However, despite this information, the HR Director and another employee conducting the investigation recommended the employee's termination and did not share the employee's FMLA forms with senior management. The company then terminated the employee.

At trial, the HR Director testified to her belief that an employee on FMLA leave could not take a vacation. In addition, the company's lawyers displayed photos from the employee's vacation in Mexico of the employee standing and holding a large fish, despite the fact that the company did not have knowledge of the photos when it made the decision to terminate the employee.

In reviewing the company's objection to the trial court's jury instruction regarding the location of the FMLA leave, the state supreme court explained the analysis an employer should use when determining whether an employee has abused his FMLA leave:

We clarify today that an employer may validly consider an employee's conduct on vacation – or, for that matter, anywhere – that is inconsistent with his or her claimed reasons for medical leave, when the employer has such information at the time the employer is evaluating whether leave has been properly or improperly used.

Here, [plaintiff] took FMLA leave to allow his foot to recover fully from surgery. Such recovery could take place in a warm climate as well as in a New England winter. That being said, vacationing while on FMLA leave may take either permissible or impermissible forms. An employee recovering from a leg injury may sit with his or her leg raised by the sea shore while fully complying with FMLA leave requirements but may not climb Machu Picchu without abusing the FMLA process. Careful consideration of the reasons for the medical leave and the activities undertaken, including the timeline for rehabilitation and recovery, are required to determine whether FMLA leave has been abused.

DaPrato v. Massachusetts Water Resources Authority, ___ N.E.2d ___, at *7 (Mass. Sup. Ct. June 5, 2019).

In reviewing the awards of punitive damages and liquidated damages, the Supreme Judicial Court determined that the employer, while honest in its belief that it was complying with the FMLA, was not objectively reasonable in its belief. The trial court found the employer ignored the plaintiff's medical records and FMLA application and instead made its decision based on "shock, outrage and offense" that the employee might request additional FMLA leave for knee surgery. This shock and outrage was memorialized in the email exchange between the HR Director and the HR Manager. The court also concluded the punitive damages could be awarded based on the jury's possible belief that the HR Director was hostile to the idea of the employee taking additional FMLA leave as demonstrated by her email. In addition, trial testimony indicated the HR Director believed that any vacation while on FMLA leave was inconsistent with such leave. Thus, the court upheld the punitive damages and liquidated damages awards, providing the employee with more than a million dollars in damages.

Key Takeaways:

The key takeaways from the decision are that employers should refrain from making knee-jerk decisions relating to FMLA based on what initially might seem to be employee abuses of leave. Decisions to terminate employees should be based on a reasoned review of the facts, including all of the medical information provided by the employee's medical providers. Finally, as with any HR decisions, managers should be very careful regarding the information they memorialize in email exchanges, because firing off a message based on your initial reaction return to haunt the company as "Exhibit A" in a lawsuit several years down the road.