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Big-box employee's attempt to 'scam' company undercuts FMLA claims

The 7th U.S. Circuit Court of Appeals recently clarified what employee notice of leave is "sufficient" to trigger protections under the Family and Medical Leave Act. In *Curtis v. Costco Wholesale Corp.*, 2015 WL 7455281 (7th Cir. Nov. 24, 2015), the 7th Circuit examined whether an optical manager's notice to a subordinate employee of his intent to "scam" Costco by taking "medical leave" was sufficient notice under the FMLA.

Keith Curtis, an optical manager first hired by Costco in 2001, was counseled by the company regarding performance concerns beginning in March 2011.

Shortly thereafter, Curtis requested and was provided FMLA leave for stress and anxiety. Upon returning to work in November 2011, Curtis received additional counseling regarding his performance and was eventually placed on a performance improvement plan in April 2012.

In May 2012, Curtis notified a subordinate employee that he intended to "scam" Costco by taking a "medical leave to secure his managerial rate of pay and position in the event of demotion." Because Costco determined that, "by this comment, Curtis had violated its manager standard of ethics," Curtis was demoted from optical manager to cashier on May 19, 2012.

Two days later, Curtis requested and was provided a second approved FMLA leave. On June 6, 2012, Curtis requested that he be transferred to a location in Merrillville, Ind. However, Costco denied his transfer request while he was out on FMLA leave.

In January 2013, Curtis provided documentation from his treat-

ing physician which stated that he was able to return to work, but only to a different Costco location. In July 2013, Curtis was offered and accepted a position to return to work at Costco at its Merrillville location.

In May 2013, Curtis filed suit against Costco, alleging retaliation for engaging in FMLA-protected activity, FMLA interference, discrimination based on his disability and failure to accommodate under the ADA. The U.S. District Court granted summary judgment in favor of Costco on all four claims. Curtis appealed.

Regarding Curtis' FMLA claims, the 7th Circuit determined that Curtis' comment about his intended medical leave did not constitute sufficient notice under the FMLA and did not qualify as protected activity. The 7th Circuit held that Curtis' comment was not sufficient notice under the FMLA since, "Curtis' statement (to a subordinate employee no less), that he was contemplating taking a 'medical leave' does not give Costco management sufficient information regarding the leave, duration of the leave, the timing of the leave and his health condition justifying the leave, to place Costco on notice."

The 7th Circuit highlighted that Costco's FMLA policy and procedure were well-known to Curtis, as evidenced by his approved FMLA leave in March 2011 and May 2012.

Even if Curtis' comment was sufficient notice under the FMLA, the 7th Circuit emphasized that, "activity that might normally receive FMLA protection is stripped of that protection when it is fraudulent."

The 7th Circuit noted that, "this particular comment fell outside the scope of protected activity,

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given the undisputed fact that Costco acted on information that [the subordinate employee] voluntarily passed to management — namely, her concern that Curtis intended to 'scam' the company by taking a fraudulent medical leave."

The 7th Circuit also held that Curtis' FMLA retaliation claim failed because Curtis was unable to refute Costco's evidence that "prior to Curtis' demotion, he faced a plethora of performance issues ..."

The 7th Circuit noted that pursuant to Northern District of Illinois Local Rule 56.1, Curtis was required to "provide citation to any admissible evidence in support of his denials" of the statement of material facts that Costco submitted in support of its summary judgment motion.

Instead, "Curtis failed to admit or deny facts and provided only

boilerplate objections, such as 'relevance' and 'vague and ambiguous.'" Accordingly, the 7th Circuit held that because Curtis denied Costco's material facts but did not "provide the admissible evidence that supports his denial in a clear, concise, and obvious fashion, for quick reference of the court," the district court properly deemed these facts admitted by Curtis.

The 7th Circuit concluded that, "Curtis failed to present any evidence disputing Costco's basis for his demotion (Curtis' unethical conduct) that occurred while he was on a performance improvement plan. Thus, there is no competing evidence to weigh or inferences to draw in Curtis' favor."

Curtis also claimed that Costco retaliated against him when he was not allowed to return to work during his second approved FMLA leave in June 2012. The 7th Circuit held that because Curtis requested to return to work before his physician cleared him to do so, "we find Costco's failure to reinstate Curtis, at a time when Curtis was actively on FMLA leave and not yet cleared to work, does not constitute an adverse employment action and, therefore, cannot sustain an FMLA retaliation claim."

This recent decision from the 7th Circuit highlights that protections under the FMLA are not triggered until an employer receives sufficient notice that an employee is entitled to FMLA leave.

Further, even if sufficient notice is provided, this case emphasizes that FMLA-protected activity may lose its protected status where such activity is fraudulent. Such distinction provides employers with valuable tools when evaluating an employee's request for FMLA leave.