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Better Safe Than Sued — Issuing Timely FMLA Notices

The Seventh Circuit's recent opinion in *Lutes v. United Trailers, Inc.,* No. 19-1579, 2020 WL 746232 (7th Cir. Feb. 13, 2020), serves as a reminder to employers of the importance of training personnel to recognize potential leave and to issue timely notices under the Family and Medical Leave Act of 1993 (FMLA), Pub.L. No. 103-3, 107 Stat. 6. (Brandi Lutes is the Personal Representative of the Estate of Buddy F. Phillips. Phillips was employed by United Trailers, Inc.)

Background Facts

Phillips worked for United Trailers as a metal department trimmer (manual labor) for 13 years. Phillips was familiar with United's attendance policy, which requires employees to report absences by calling and leaving a voicemail before the start of their shift. Noncompliance with the policy results in the accrual of points, and an employee who accrues 13 points will be fired. Employees accrue 15 points if they fail to report an absence for three consecutive days.

United's absence calls were recorded and logged by Linda Nichols, a payroll assistant. Nichols regularly reviewed the call log with United's director of human resources so he could identify and address attendance policy violations. Randy Snyder, the plant manager, also listened to the voicemails and notified group leaders if an employee will miss a shift. Neither Nichols nor Snyder holds any certification in human resources or the FMLA.

On July 3, 2015, Phillips hurt his ribs while playing with his grandchildren. He went to the hospital the next day and was diagnosed with fractured ribs. X-rays taken that day also revealed heart issues that required additional testing. He returned to the hospital six days later for pain. During a follow-up visit on July 15, 2015, Phillips's doctor recommended that he not return to work until August.

Phillips's first scheduled workday after his injury was July 6th. Phillips or his wife properly reported his absences on July 6, 7, 8, 14, and 16. The call log for July 6 lists "rib" as the reason for his absence — this was the only entry that included a reason for the absence. Phillips's wife testified that in early July she told Nichols that Phillips had fractured his ribs and would not be at work for a while. Phillips's wife testified similarly about conversations she and Phillips had with Snyder. Snyder only recalls one brief conversation about Phillips's "chest area."

Phillips was a "no call, no show" for four consecutive days from July 20, 21, 22, and 23. Consequently, he accrued 15 points under the attendance policy and was fired. Phillips did not provide, nor did United ask, for any medical records about his ribs or reasons for his absence. It is undisputed that United never informed Phillips of his ability to take leave under the FMLA. Phillips's wife testified that had Phillips known he was able to take FMLA leave, he would have.

Phillips sued, claiming that United violated the FMLA by interfering with his "entitlement to leave" when it failed to inform him of his eligibility and rights under the FMLA. Phillips also claimed that he was retaliated against for seeking FMLA benefits. The district

court granted summary judgment in United's favor. In reaching its conclusion on the FMLA interference claim, the district court relied on the FMLA regulations and the decision in *Righi v. SMC Corporation of America,* 632 F.3d 404, 411 (7th Cir. 2011), which provided that an employee's failure to abide by an employer's usual attendance policies may foreclose an FMLA action. An appeal followed.

Summary Judgment Proper on FMLA Retaliation Claim

As to the FMLA retaliation claim, the Seventh Circuit held that even if Phillips engaged in a protected activity and suffered an adverse employment action, he failed to establish any causal connection between his alleged attempt to seek relief under the FMLA because the only evidence he had was suspicious timing between his alleged FMLA request and his firing. Relying on *Curtis v. Costco Wholesale Corp.,* 807 F.3d 215, 221 (7th Cir. 2015), and *Daugherty v. Wabash Center, Inc.,* 577 F.3d 747, 751 (7th Cir. 2009), the Seventh Circuit held that suspicious timing is rarely enough to overcome summary judgment. Moreover, Phillips did not dispute that United fired him because he failed to report his absences in accordance with United's policy. Thus, summary judgment was proper.

Interference Claim Remanded to the District Court

The primary issue before the Seventh Circuit on the interference claim was whether United violated the FMLA and interfered with Phillips's rights because it did not provide him the requisite leave information *before* he stopped reporting his absences.

To prevail on this claim, Phillips must have demonstrated (1) he was eligible for FMLA, (2) his employer was covered by the FMLA, (3) he was entitled to leave under the FMLA, (4) he provided notice of his intent to take leave, and (5) his employer denied him FMLA benefits to which he was entitled. 29 U.S.C. §2615; *Guzman v. Brown County,* 884 F.3d 633, 638 (7th Cir. 2018).

The first three prongs address whether Phillips qualified for FMLA leave. Triable questions existed over whether Phillips's rib injury was a serious health condition entitling him to FMLA leave. The FMLA defines a "serious health condition" as an injury that involves inpatient care at a hospital or that requires continuing treatment by a healthcare provider, and that renders an employee unable to perform his job. 29 U.S.C. §2611(11). Viewing the evidence in the light most favorable to Phillips, the Seventh Circuit held that a reasonable jury could find that Phillips' rib injury constituted a serious health condition because he went to the emergency room, received X-rays on his ribs, attended follow-up appointments, and was rendered unable to perform his manual labor job.

As to the fourth prong, there is disagreement about whether Phillips provided United with notice of his intent to seek FMLA leave. An employee merely calling in and declaring he is sick is insufficient to put the employer on notice that the employee may qualify for FMLA leave. *See Burnett v. LFW Inc.,* 472 F.3d 471, 480 (7th Cir. 2006). But the employee's notice obligation is satisfied so long as he provides information sufficient to show that he likely has an FMLA-qualifying condition. 472 F.3d at 479. Here, Phillips introduced evidence that Snyder and Nichols knew of his rib injury. Further, neither Snyder nor Nichols had received any FMLA training. If United failed to train its key personnel on how to recognize FMLA-qualifying leave, that may factor into deciding whether Phillips provided sufficient notice of his need for leave. The Seventh Circuit held that the evidence demonstrates genuine disputes of fact as to whether United (1) had sufficient notice that Phillips intended to take leave and, (2) at a minimum, should have inquired further into Phillips' injury.

As to the last prong of Phillips's interference claim, under the FMLA regulations, individual notice must be provided to the employee when they request FMLA-related leave or when the employer acquires knowledge that an employee's leave may be for an FMLA qualifying reason. 29 U.S.C. §825.300(b). The employer has five business days to do this. It is clear that United did not issue any notice to Phillips about FMLA leave. It is also clear that Phillips failed to comply with United's absence policy when he stopped calling into work and was fired for this reason. As previously noted, the district court, relying on the regulations and *Righi,* determined that Phillips's claim was foreclosed because he did not follow United's attendance policy. In remanding the case, the Seventh Circuit instructed the district court to further examine whether the *Righi* holding extends to the situation in which an employer would escape responsibility under the FMLA for taking advantage of Phillips's misstep. *Lutes, supra,* 2020 WL 746232 at *6, citing *Righi,* 632 F.3d at 411.

The final question the district court was instructed to address on remand is whether Phillip was prejudiced by United's violation of the FMLA, because a violation is not enough to establish injury. *See Ragsdale v. Wolverine World Wide, Inc.,* 535 U.S. 81, 89, 152

L.Ed.2d 167, 122 S.Ct. 1155 (2002); *Ridings v. Riverside Medical Center,* 537 F.3d 755, 764 (7th Cir. 2008) (holding not interference because employee did not allege that employer's failure to provide FMLA information prejudiced her). Recall that Phillips's wife testified that if United offered FMLA, Phillips would have taken it. The Seventh Circuit opined that "if Phillips can show prejudice — in other words, that he would have structured his leave differently had he received the proper information . . . his claim may survive summary judgment." [Citation omitted.] *Lutes, supra,* 2020 WL 746232 at *7, citing *Ragsdale, supra,* 122 S.Ct. at 1162.

This is a case with a simple but interesting set of facts. In the event that the case does not settle (and it very well might, given the passage of time, Phillips's death, legal expenses, and remand for triable issues), the outcome will be insightful for employers and practitioners moving forward.

Employer Takeaways

1. Train human resources employees and others involved with monitoring employee absences about employer and employee rights and responsibilities under the FMLA.

2. If you are tracking absences to determine if there is compliance with your attendance policy, also look to see if the pattern of absences may be telling you something else that you should follow-up on.

3. Talk to your employees. Ask basic questions to make informed decisions. Return calls if an absent employee tries to reach you.

4. Be familiar and comply with the strict deadlines in the FMLA for notifying employees of their eligibility for FMLA leave, rights and responsibilities under the FMLA, and your designation of FMLA leave.

a. **FMLA Eligibility.** Once an employee notifies an employer of an FMLA qualifying medical leave "the employer must notify the employee of the employee's eligibility to take FMLA leave within five business days" of ascertaining that their leave may be for an FMLA-qualifying reason, absent extenuating circumstances. 29 C.F.R. §825.300(b)(1). Also, the employer must provide written notice of FMLA rights and responsibilities. 29 C.F.R. §825.300(c).

b. **FMLA Designation Notice.** Within five days of when an employer has enough information to determine whether the employee's leave is FMLA qualifying, the employer must notify the employee in writing as to whether the leave will be designated and will be counted as FMLA leave. 29 C.F.R. §825.300(d)(1).

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