

# Facebook Postings Showing Misuse of FMLA Leave Can Form Sufficient Legal Basis of Termination

March 25, 2013

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Based on the number of social media decisions from the National Labor Relations Board over the past two years, most employers understand that when employee Facebook postings constitute “protected activity” under the National Labor Relations Act (NLRA), the postings can be legally protected. However, the NLRA is not the only federal law that can be implicated in Facebook-related firings. A federal district court in Michigan recently held that a hospital that fired an employee while she was on medical leave did not violate the Family and Medical Leave Act (FMLA), because the employee had posted—on her Facebook page—photos and text about vacation activities that were inconsistent with her medical restrictions, and then lied about those activities. *Lineberry v. Richards*, No. 2:11-13752, (February 5, 2013).

The FMLA prohibits employers from discriminating against or retaliating against employees for taking FMLA leave, and provides that an employee returning from such leave shall be reinstated to his or her employment position or an equivalent position. However, the regulations associated with the FMLA establish that interference with an employee’s rights does not constitute a violation of the FMLA if the employer had a “legitimate business reason” unrelated to the exercise of FMLA rights for its action. Therefore, an employer can avoid FMLA liability by showing that it would have taken the adverse action even absent the employee’s leave under that Act.

Carol Lineberry had been employed by the Detroit Medical Center (DMC) as a registered nurse for over a year when she injured her back in a work-related incident in January 2011. After Lineberry’s physician ordered her not to return to work, Lineberry requested and was granted FMLA leave from January 27 through April 27, 2011, as well as over \$3,000 in short-term disability (STD) benefits. During that leave, Lineberry took a

preplanned and prepaid vacation to Mexico from February 26 to March 2, 2011. Her physician okayed the trip, stating that he believed that it would not be as physically demanding as Lineberry's performance of her work duties, which had included 12-hour work days of walking and moving patients on stretchers.

While on vacation, Lineberry posted photos of herself riding in a motorboat, and holding her young grandchildren, one in each arm, as she stood. She also posted details of her days, which included babysitting those grandchildren and various other physical activities. Based on those postings, Lineberry's co-workers complained to Lineberry's supervisor about activities that they considered to be "abuse" of Lineberry's FMLA leave. The supervisor emailed Lineberry, after Lineberry complained that she had not received a get-well card from the staff, stating that since Lineberry was "well enough to travel on a 4+ hour flight, wait in customs lines, bus transport, etc., we were assuming that you would be well enough to come back to work" after the vacation. Lineberry responded that she "was in a wheelchair" at the airports because she was "unable to stand for more than 10 minutes at a time."

Lineberry's supervisor relayed the information and the co-workers' complaints to DMC's Loss Time Management Department (LTM), which then asked Lineberry's physician for additional clarification on Lineberry's restrictions. On March 30, 2011, the physician informed DMC that Lineberry's restrictions during her leave included standing for only 15-minute intervals, a lifting restriction of 5-10 pounds, and no pushing or pulling more than 20 pounds.

Based on that information, and in light of a progressive discipline policy that requires an investigative meeting facing termination, Lineberry was asked to attend an April 19, 2011 meeting with a number of DMC managers, including the director of security investigations. At that meeting, Lineberry initially restated her claim that she had used a wheelchair in all airports during her travel, but rescinded that statement when reminded that airports have security films that could be reviewed. She then admitted that she had lied about that fact in her email to her supervisor. Lineberry also admitted to holding her grandchildren. Lineberry's employment was terminated after that meeting, based on the recommendation of DMC's Human Resources department.

Lineberry filed a lawsuit against DMC and a number of individuals who were involved in the meeting and the termination decision, alleging interference with her FMLA leave and retaliation for taking that leave. DMC filed a counter-claim for reimbursement of the STD benefits. The district court granted the defendants' motion for summary judgment on two bases.

First, the court found that because Lineberry lied about using the wheelchair and admitted that lie, that point was undisputed. Therefore, DMC treated Lineberry as it would have whether or not she was on FMLA leave when it fired her for her dishonesty. Second, the court found that DMC was entitled to summary judgment under the "honest belief" doctrine, which states that an employer can successfully defend an FMLA lawsuit if it shows that it acted upon its honest belief—based on particularized facts—that the employee has misused an FMLA leave. Here, Lineberry's admitted dissembling about the wheelchair and her Facebook postings

about her activities caused DMC to believe that Lineberry had abused her FMLA leave and led directly to her firing.

This decision does not mean that every vacation-related Facebook posting should lead to termination, nor does it mean that those postings always will create an “honest belief” that an employee has abused FMLA leave. However, in this instance, the hospital’s compliance with its own disciplinary policy and its interaction with the doctor to obtain appropriate information about Lineberry’s restrictions before taking adverse action against Lineberry indicate an awareness of the FMLA and its associated regulations that provides a strong model for other employers to follow. It also is worth noting that this is a district court decision that could yet be appealed to a federal appellate court.

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