

Seventh Circuit Interprets Statute of Limitations for Family and Medical Leave Act

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On October 20, 2015, the **Seventh** Circuit held that the two-year statute of limitations for alleged violations of the **Family and Medical Leave Act (FMLA)** begins to run each time an employer classifies an employee's absence as unexcused rather than the statute beginning to run when an employee is terminated for reaching a cumulative number of unexcused absences. In a case of first impression before the Seventh Circuit, the court held that a former employee's claim was not filed within the appropriate two year statute of limitations period and was therefore, time-barred. **Barrett v. Illinois Department of Corrections**, 803 F.3d 893(7th Cir. 2015).

Cindy Barrett began working for the **Illinois Department of Corrections (IDOC)** in December of 1995. Throughout her employment, IDOC maintained a progressive discipline policy for repeated unauthorized absences with discipline ranging from oral reprimands to suspensions. After 12 unauthorized absences, the employee could be terminated. If an employee worked for two years without an unauthorized absence, then all prior unauthorized absences were expunged from the employee's attendance record.

Between 2003 and 2010 Barrett accrued 12 unexcused absences. She did not contest 9 of the absences being classified as unexcused. However, Barrett contested 3 of the absences as wrongfully classified as unexcused. Barrett alleges that her absences on December 15, 2003, December 22, 2004 and August 10, 2005 were protected absences under the FMLA. Per IDOC's administrative policies, Barrett challenged each of the contested absences with IDOC's Employee Review Board, but the Board upheld the absences as unauthorized and issued discipline for each of the unexcused absences. Barrett was given a verbal reprimand, a 3-day suspension and a 5-day suspension for each of her respective absences.

IDOC fired Barrett in October 2010 after she accumulated 12 unauthorized absences. Following her termination, Barrett sought review before the Illinois Civil Service Commission, but never raised an FMLA argument. An administrative law judge for the Illinois Civil Service Commission sustained the termination, and the Commission adopted that recommendation.

In January of 2010, Barrett brought suit against IDOC in federal court for allegedly violating her rights under the FMLA. Interestingly, she never raised an FMLA issue with her supervisors, the Employee Review Board or the Illinois Civil Service Commission. The issue was raised for the first time in the

federal complaint. Ruling on a Motion for Summary Judgment, the district court concluded that the suit was barred by the FMLA's two-year statute of limitations in §2617(c). Barrett argued that the limitations period began to run when she was terminated on October 15, 2010 and her suit was timely as it was filed within 17 months of that date. IDOC argued that the FMLA violations accrued when each absence was classified as unexcused arguing that her suit was untimely as it was filed over 3 years after the statute of limitations period expired. The District court agreed with the IDOC and found the suit time barred. *Barrett v. Illinois Department of Corrections*, 958 F. Supp. 2d 984 (C.D. Ill. 2013).

The Seventh Circuit upheld the district court's ruling in favor of IDOC because Barrett did not file suit within two years of the last unauthorized absence as upheld by the Employee Review Board. The court began their analysis by reviewing the statutory text of the FMLA, which provides, in relevant part that "an action may be brought under this section not later than 2 years after the date of the last event constituting the alleged violation for which the action is brought." 29 U.S.C. §2617(c)(1). The court interpreted the statute as meaning that the "last event" constituting the claim ordinarily will be the employer's rejection of the employee's request for leave. Specifically, the court held that "each time the Employee Review Board ruled against Barrett, an actionable FMLA claim accrued and the limitations clock started to run." Therefore, the court ruled in favor of IDOC as Barrett failed to timely file suit within two years of the December 2003, December 2004 and August 2005 leave denials by the Employee Review Board. Barrett's suit was "several years too late" by the time she filed in January of 2012.

The FMLA statute of limitations, in the context of an absenteeism policy, has only been addressed by two other courts, which reached very different conclusions. In *Butler*, the Sixth Circuit held that a plaintiff who was fired for excessive absenteeism may challenge the termination under the FMLA even though the limitations period for the absences allegedly protected by FMLA had long since expired. *Butler v. Owens-Brockway Plastics Products, Inc.*, 199 F.3d 314, 317 (6th Cir. 1999). In *Reed*, the Eighth Circuit held that an FMLA violation occurs when an employer improperly denies an employee's leave request and not when an employee is later terminated for excessive absences. *Reed v. Lear Corporation*, 556 F.3d 674, 681 (8th Cir. 2009).

While the Seventh Circuit joined the Eighth Circuit in its conclusion on when the statute of limitations period begins to run, only time will tell how other appellate courts will rule on this issue. The *Barrett* decision would appear to require the employee to bring a suit or an administrative complaint with each individual denial of FMLA leave. Employers faced with FMLA claims should carefully check the dates under their absenteeism policy to determine whether an FMLA claim is timely.

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