

Timing Is Everything: FMLA Claim Survives Summary Judgment Where Employer Began Auditing Employee's Records The Day After FMLA Leave Request

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Employees requesting, currently taking, or just returning from leave under the Family and Medical Leave Act ("FMLA") can be terminated for legitimate reasons that are unrelated to their FMLA leave. This point is exemplified by *Jennings v. Univ. of N.C.*, N.C. Ct. App., Case No. COA16-1031 (July 5, 2017), [which was the subject of a prior post on this Blog](#). In *Jennings*, the North Carolina Court of Appeals ruled that an employer did not violate the FMLA by proceeding with a disciplinary hearing and termination of an employee because of allegations of misconduct that arose *prior to* her FMLA leave.

Timing is everything in life, however, and the timing of an employer's investigation of misconduct by an employee in relation to the employee's request for leave is significant. The Western District of Missouri's denial of summary judgment in *Diamond v. American Family Mutual Insurance Company*, Case No. 4:16-cv-00977 (Nov. 9, 2017), illustrates this point. Diamond, a claims adjuster for American Family Mutual ("AFM"), met with his supervisor on February 12, 2015 for his annual performance review, which was positive. During that meeting, Diamond told his supervisor that he was planning to take FMLA leave. The next day, Diamond's supervisor pulled phone records to investigate if Diamond had actually made calls that he reported making. The supervisor testified the investigation was prompted by complaints in January and February 2015 from insureds and agents who reported they had not received follow-up calls or call-backs from Diamond. After the supervisor determined that Diamond's claim file entries were inconsistent with the report of calls made from his desk phone, Diamond was terminated for falsifying company records on February 24, 2015.

In denying AFM's summary judgment motion, the court acknowledged that the FMLA does not prohibit an employer from terminating an employee for reasons unrelated to the FMLA, and the court also acknowledged that falsifying records is a lawful reason for termination. However, the court found there were issues of fact as to the reasons for Diamond's termination, noting that Diamond's phone records were pulled the day after he expressed his intent to take FMLA leave and that Diamond had received a favorable performance review the day before his records were pulled.

The *Diamond* decision serves as an important reminder that employers must be extremely cautious when disciplining employees who have recently requested, taken, or returned from FMLA leave.

While discipline is lawful if unrelated to the request, courts will be skeptical if there is evidence that the employer began looking for misconduct after the FMLA leave request was made. Additionally, *Diamond* is a good reminder that employers should ensure that performance reviews are accurate and consistent with any concerns regarding an employee's performance and conduct.

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National Law Review, Volume VII, Number 325

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