



Court Decides Not Returning Employee's Calls is Sufficient for FMLA Retaliation Claim to Proceed

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A federal court in Pennsylvania has found an assistant manager's failure to return an employee's calls while the employee was out on Family and Medical Leave Act leave was sufficiently antagonistic to support a *prima facie* case of retaliation under the FMLA. *Hofferica v. St. Mary Med. Ctr.*, No. 10-6026 (E.D. Pa. Sept. 20, 2011). Accordingly, the court denied the employer's motion to dismiss the claim.

Background

Kathleen Hofferica, a nurse at St. Mary Medical Center, was diagnosed with Ménière's disease in March 2008. She applied for intermittent leave on April 22, 2008, and was pre-approved for leave from February 5, 2008, through February 4, 2009.

In September 2008, however, Hofferica learned she had to undergo a series of surgeries as treatment for her condition. She, therefore, commenced her FMLA leave, and told St. Mary her anticipated return-to-work date was November 6, 2008.

On a weekly basis, either she or her husband called an assistant nurse manager at St. Mary to provide updates of her progress and her anticipated return date. Hofferica claimed that she called the assistant manager on November 4 to explain that her doctor might push back her anticipated return date. The call was not returned.

On November 5, Hofferica's doctor cleared her to return to work on November 13, 2008. The next day, Hofferica called to notify the assistant manager of the date change and to request an extension to accommodate her disability. Again, the call was not returned. On November 12, Hofferica received a letter from St. Mary, dated November 7, informing her that she had been terminated because her medical leave had expired and she did not return to work.

Hofferica filed suit against St. Mary, alleging violations of the Americans with Disabilities Act, the Pennsylvania Human Relations Act, and the FMLA. Under the FMLA, she claimed interference and retaliation. St. Mary moved for dismissal of all claims.

Retaliation Claim Survives

After rejecting Hofferica's other claims, the court found that she stated a claim of FMLA retaliation because she alleged sufficient antagonism based on the assistant manager's failure to return her phone calls after she started FMLA leave. Noting that while an employer's failure to return an employee's phone calls does not demonstrate *overt antagonism*, the court said it certainly suggests an *antagonistic attitude* toward the employee, particularly where such failure began after the employee initiated FMLA leave and continued despite regular communications from the employee. The court found that a reasonable factfinder could conclude that such behavior was sufficient to establish a *prima facie* case of retaliation under the FMLA. Accordingly, the court rejected St. Mary's motion to dismiss the retaliation claim.

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Employers are reminded that it is imperative to maintain communication with employees on FMLA leave *throughout* the leave period, not just when the employee's date of return draws near. As the court pointed out in this case, overt antagonism need not exist to establish a *prima facie* claim of retaliation. Therefore, in the Eastern District of Pennsylvania, diligence in continuing communication will help mitigate the risk of suit for employers.

Jackson Lewis attorneys are available to discuss this case and other workplace law developments.

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