

WAYNE STATE UNIVERSITY

MEMORANDUM

TO: XXXXXXXXXX
FROM: Michelle Fecteau, Labor Studies Center
DATE: June 26, 2003
RE: FMLA question

The purpose of this memo is to address your question:

1) Can my employer legally fire an employee for absenteeism and tardiness when they had knowledge that absences/tardiness were due to her serious health condition and her son's serious health condition?

The FMLA legislation and regulations clearly state that an employer cannot hold FMLA qualifying absences against an eligible employee in order to discipline or discharge that employee. Section 825.220(c) of the FMLA Regulations states:

“An employer is prohibited from discriminating against employees, or prospective employees who have used FMLA leave. For example, if an employee on leave without pay would otherwise be entitled to full benefits (other than health benefits), the same benefits would be required to be provided to an employee on unpaid FMLA leave. By the same token, **employers cannot use the taking of FMLA leave as a negative factor in employment actions, such as hiring, promotions or disciplinary actions, nor can FMLA be counted under “no fault” attendance policies.**” (emphasis added).

It is my understanding from our conversation earlier today that the employee meets the eligibility requirements under the law. (The requirements are 1) she has completed 12 months of service, 2) worked at least 1250 hours in the 12 months before each FMLA absence, 3) works for the county which is a covered employer, and 4) there are at least 50 county employees within a 75 mile radius).

Employee Notification under FMLA

Your employer may try to assert that the grievant did not provide proper notice to receive FMLA coverage. Keep in mind there has been a number of Circuit Court cases that have made clear that an employee does not need to specifically request the “FMLA” in order to qualify for leave. Sufficient notice is given if an employee provides information to the employer (any manager or supervisor) that puts the employer on notice that the employee has a reason for the leave that is FMLA-qualifying.

I am enclosing a review of one fairly recent decision *Spanngler v. Federal Home Loan Bank of Des Moines* (8th Cir. 2002) which involved a woman suffering from depression. Here the court noted that “an employee need not invoke the FMLA by name in order to put an employer on notice that the Act may have relevance to the employee’s absence from work.” The employer’s duties to inform the employee of her rights and provide leave “are triggered when the employee provides enough information to put the employer on notice that the employee may be in need of FMLA leave.”

Enforcing FMLA Rights

The union may enforce FMLA rights by filing a grievance under the “just cause” or (discipline/discharge) provisions in your contract, as well as the FMLA language incorporated in

your contract. The union also has the option of contacting an attorney regarding the grievant's legal right to sue the employer as well as personally sue the human resource manager who made the decision to terminate in violation of the FMLA. Keep in mind that an attorney would be able to collect legal and expert witness fees in addition to the damages collected by the grievant.

The union can go back two years, three if the employer knew or should have known about FMLA requirements, to seek remedy under the law. Unions have also filed and won class action cases against employers who are not in compliance with the Act.

I hope this information is helpful to you. Please feel free to contact me if you have any questions or I can provide further assistance.

Best Wishes,
Michelle