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FMLA LEAVE

Tenth Circuit sticks fork in forklift operator's FMLA claims

by Lance Rich

In the following case, a former forklift operator in Kansas filed claims under the Family and Medical Leave Act (FMLA) against a manufacturing company after he was fired following an industrial accident. The U.S. Tenth Circuit Court of Appeals, whose rulings apply to both Utah and Kansas employers, decided the employee wasn't entitled to a trial on his claims, despite the fact that he was fired while on FMLA leave. Read on to find out why.

The accident

Robert Peterson worked as a material handler for Exide Technologies at its battery manufacturing and distributing plant in Salina, Kansas. In May 2007, he was using a forklift to transport pallets of batteries. The plant's normal lights were turned off for maintenance, but the plant was lighted to some degree by fluorescent lights, skylights, and ambient light from the doors. Additionally, the forklift was equipped with headlights. Nevertheless, Peterson complained to his supervisor about the low lighting.

While Peterson was driving a forklift through the plant with a pallet of batteries, the pallet hit a pole, causing batteries to fall on the floor, break, and spill acid. Peterson hit his head on the forklift's rack, resulting in injuries to his head, neck, and back. Exide placed him on FMLA leave for 10 days.

Peterson's supervisor conducted an accident investigation and concluded that Peterson was "going rather fast." Exide's HR manager then reviewed the incident report to determine whether to impose discipline. He found three written warnings in Peterson's personnel file, including warnings for unauthorized use of machinery, careless material handling resulting in damage to batteries, and an unspecified health and safety violation. He also found that Peterson had run a forklift into

a pole a year earlier. Further, a month before the latest accident, he received a memo noting areas of improvement, including following safety rules and maintaining control when driving. Four days after the forklift accident, Peterson received a termination notice.

Peterson sued Exide in federal district court in Kansas, raising claims of retaliation for exercising his FMLA rights, interference with his FMLA rights, and failure to restore him to his position following FMLA leave. The district court dismissed his claims without a trial, and Peterson appealed to the Tenth Circuit.

Unsafe job performance dooms retaliation claim

Once an employee establishes a basic retaliation claim, the employer must provide a legitimate nondiscriminatory reason for the adverse employment action. In this case, Exide didn't contest that Peterson had established a basic retaliation claim but argued that he was fired because of his unsafe job performance. It was then up to Peterson to show there was a genuine issue about whether the explanation was simply a cover-up for a discriminatory reason. He could do so by showing weaknesses, implausibilities, incoherencies, or inconsistencies in Exide's explanation.

Peterson first argued that Exide's explanation was a pretext because it violated its own progressive disciplinary rules. He argued that the company's disciplinary policy required that he receive a first written warning, a second written warning, indefinite suspension, and then discharge. According to him, Exide was required to go through each step of its progressive discipline policy before firing him. He also argued that the disciplinary policy didn't allow Exide to consider violations older than one year in imposing discipline, but the court disagreed.

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The Tenth Circuit found that the disciplinary policy was discretionary, not mandatory. It also found that the policy didn't prohibit Exide from considering older policy violations. Although the policy indicated that employees would start over if it had been a year or longer since the last disciplinary action, it also stated that all disciplinary actions remained part of an employee's file and that failure to respond to past warnings could result in discharge regardless of the time element.

Peterson next argued that the firing was retaliatory because Exide created the dangerous conditions under which he was operating when the accident occurred by requiring him to work in dim light. The court questioned whether Exide was at fault, particularly because Peterson's path was lighted by skylights, fluorescent lights, and the forklift's headlights.

Nevertheless, even if Exide was careless, the court concluded that Peterson's argument couldn't support a finding of pretext. That's because the question of pretext isn't whether the decision to terminate was wise, fair, or correct but whether Exide (1) reasonably believed at the time of discharge that Peterson had violated company policy and (2) acted in good faith on that belief.

The court noted that if an employer forces an employee to violate a company policy and then fires him for the violation, it might show that the employer's justification for its action wasn't in good faith. However, in this case, Peterson provided only his own testimony that he felt uncomfortable driving through the plant in the dim light, and the court found that Exide reasonably could have expected him to slow down and drive more carefully given the lighting conditions.

Peterson also argued that he established pretext because he shouldn't have been fired over such a minor incident. The court not only questioned whether the accident was minor but also determined that nothing prevented Exide from firing employees for minor safety violations. The court reasoned that even a minor incident may be the last straw, particularly when an employee has a record of unsafe work performance, which was the case with Peterson.

Interference claim suffers similar fate

The court decided that Peterson's claim for failure to restore him to his previous position in violation of the FMLA wasn't separate from his interference claim. While the court recognized that an employee who takes FMLA leave has a right to be restored to his previous position, he has no reason to assert a claim to restoration until the employer interferes with the exercise of that

right. Thus, a failure-to-restore claim is a specific type of interference claim.

The Tenth Circuit determined that Peterson wasn't entitled to a trial on his interference claim. According to the court, once an employee establishes a basic interference claim, the employer may defend against the claim by showing that he would have been fired regardless of his request for or taking of FMLA leave. Exide didn't contest that Peterson established a basic interference claim but argued that it would have fired him for violating the company's safety policies, regardless of whether he had injured himself during the accident. For the same reasons that the court rejected Peterson's arguments of pretext on his retaliation claim, the court agreed there was no evidence to establish that he was fired for taking FMLA leave. *Peterson v. Exide Technologies*, 2012 WL 1184001 (April 10, 2012).

Handle with care

Employees are the batteries of a company. They provide the energy needed for businesses to be successful. When employees are damaged and need to take FMLA leave, they need to be handled with extreme care so they don't leak lethal litigation. Nevertheless, courts recognize that there are situations in which employers are justified in terminating even injured employees on FMLA leave. However, before taking that step, employers should make sure they take appropriate precautions.

Drafting flexible disciplinary policies is an important first step. It helped in this case that Exide's disciplinary policy, although generally progressive in nature, allowed the employer the flexibility to terminate an employee at any time for any reason. Second, it's important for companies to keep in each employee's file good records of acts that violate company policy. In this case, given the previous warnings issued to Peterson, the court had no trouble confirming Exide's reasons for terminating him.

Finally, the notice of termination Exide sent to Peterson specifically informed him that he was being fired for flagrant disregard of safety rules and practices that endangered other employees. Specific reasons for termination and sufficient documentation supporting those reasons can protect employers against the corrosive potential of FMLA claims.

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