

Words Matter in Attendance Policies

By: Nancy Conrad and George C. Morrison
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The Third Circuit Court of Appeals recently identified the difference between merely "requesting" Family and Medical Leave Act (FMLA) leave and "requesting and reporting" FMLA leave. At issue in the case was the employer's policy that required an employee to request and be approved for FMLA leave and, once approved, to report an FMLA absence when the absence was taken. In particular the policy required the employee when taking an unscheduled absence, to telephone a designated call-off line, report the absence and designate whether the absence was sick time, FMLA leave, PTO leave, or some other leave.

In the case, the employee had requested and been approved for FMLA leave over a twelve-month period. The employee was absent during the time period but she did not report the absences in accordance with the employer's call-off procedures; she called off for the unscheduled absence but did not state that the absence was FMLA designated leave time. In other words, she did not report the absence as FMLA leave.

After several unscheduled absences, the employee's supervisor met with the employee, provided her copies of the call-off procedures and reminded her that she needed to report absences as FMLA leave via the call-off line. After another unscheduled and undesignated absence, the employee received a final written warning and was counseled again about the call-off procedures. Per the employer's policy, the employee was terminated from her employment after a ninth unscheduled and undesignated absence.

The employee argued that her absences were protected under the Americans with Disabilities Act (ADA), FMLA and Pennsylvania Human Relations Act (PHRA) because she had been approved for FMLA leave. The District Court disagreed and held that her failure to comply with the employer's absence-reporting policy defeated all her claims. The Third Circuit agreed and specifically noted that regardless of whether the absences were FMLA approved, the employee was required to comply with the employer's reporting procedures. "The [employer] acted within its prerogative in firing [the employee] for her continued failure to report her absences in accordance with its policies" and the employee made no argument to rebut the employer's legitimate reason for terminating her employment.

This case demonstrates several key factors in employee discipline and discharge. Policies, and as demonstrated in this case, attendance policies, must be written in plain, easy to understand language that clearly outlines the procedures. Policies must be distributed to employees in a timely and regular manner and be easily accessible to employees. Supervisors must track policy violations and notify employees in writing about such violations. In this matter, the employer provided notice about the FMLA/attendance procedures at the time the employee was approved for FMLA leave and the supervisor provided additional notice about the policy during counseling sessions and in a written warning. Clearly written policies and employee notice about the procedures formed the basis of the ruling in favor of the employer. The start of the new year is an opportune time for employers to review and update policies and to remind employees about work related procedures, including attendance policies.

The employer in the case was represented by Nancy Conrad and George Morrison. The opinion can be accessed [here](#).

If you have questions or need assistance with review of policies, discipline procedures and defense of litigation matters, please contact Nancy Conrad (conradn@whiteandwilliams.com; 610.782.4909), George Morrison (morrisong@whiteandwilliams.com; 610.782.4911) or another member of our Labor and Employment Group.

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