Six Ways Your Managers are Causing FMLA & ADA Lawsuits, and How to Train Them to Stop
Your **Webinar** Hosts

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Welcome

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Let’s start with a story . . .

This is Jake, one of your managers.

He manages Debby.

Jake wants to fire Debby because she took FMLA leave.

How do we know?
He wrote it down!

Jake’s email to HR: “[W]e need to move to termination as soon as possible for several reasons [including that Debby] submit[ted] a request for medical leave.”
Then one day, Debby sued.  

(Spoiler alert: she won!)  

Jake is deposed.  

And he told us why he did what he did...
“I’m not really familiar with the FMLA because I’m on the front line.”
AAAAAAAGH!
Your Managers Are KILLING You!

And it’s no defense that your HR Department is stretched too thin!

Consider this case:

The manager:
• Told employees they looked “old” and “should wear their dentures”
• Told an employee that a stroke victim looked “weak”
• Collected FMLA paperwork from an employee . . . then left it in his car for months.

Court: the remote HR department’s non-involvement (one HR person for 120 stores and 3,600 employees) = evidence of interference

*Abdelmassih v. Mitra LLC (E.D. Pa., 2018)*
“Front-line managers...who are often unaware of what is protected by the FMLA . . . are uninformed about their role in the process.

“They also sometimes engage in improper communication with employees about motives or personal lives, and it’s exactly these types of behaviors that can lead to discrimination and wrongful termination claims and introduce liability for organizations.”

Helen Applewhaite
DOL’s FMLA Branch Chief
Toxic Boss: 76%
Power Hungry Boss: 25%
Incompetent Boss: 17%
Boss as Mentor: 19%
We’ll address each of the six different ways your managers create FMLA liability:

- Review Recent Cases
- Provide Examples of What To Do
- Provide Training Tips on What Your Managers Need to Know
The 6 Types of FMLA/ADA Offenders

- The Space Case
- The Lazybones
- The Head Stuck in the Book
- The Over-sharer
- The Badgerer
- The Troublemaker
Meet the Offenders

The Space Case
Knew/should have known there was a medical condition, yet did nothing

The Lazybones
Knew of the leave but failed to redirect to proper channels

The Head Stuck in the Book
Does not recognize patterns of FMLA abuse

The Over-sharer
Failed to respond to the request appropriately

The Badgerer
Improperly contacted employees during leave

The Troublemaker
Tainted the termination decision

Meet the Offenders
Type One: The Space Case
The Migraine Headache

- Mikyla, registered nurse
- Charge nurses aware of migraine headaches, medication
- Frequent call-offs: some = migraine; some = headache
- Vague attendance logs noting “headache” as reason for absence
- **FMLA Problem**: These facts sufficient to trigger the company’s obligation to investigate further as to whether Mikyla needed FMLA leave

*Brown v. Cox Health* (W.D. Mo. Jan 2016)
Sick Leave Combined with More Serious Reasons

- Shawn, registered nurse
- Suffered from congenital heart condition
- Left work early to go to ER due to irregular heart beat
- Canceled next two shifts and called in “sick” on another shift
- Doctor’s note: “absence due to heart condition”
- Terminated for violated time/attendance policy
- **FMLA Problem**: employer had enough information about health condition that it should have inquired about need for FMLA leave

*Fitzgerald v. Shore Medical Center* (D.N.J. March 2015)
Help Managers See How Serious Health Condition Is *Different* than Being “Sick”

An illness, injury or physical or mental condition that involves:

- Inpatient care (i.e., an overnight stay)
- *A period of incapacity for more than 3 consecutive calendar days and “continuing treatment”*
- Any period of incapacity for pregnancy or prenatal care (or prenatal visits, morning sickness)
- *Chronic serious health condition*
- Absences for treatment (e.g., chemotherapy)
Typically **not** SHC:
- Common cold or flu
- Earache
- Upset stomach
- Ordinary dental work
- Non-migraine headaches

Typically **are** SHC:
- Chronic conditions, cancer
- Depression/mental health issues
- Significant illnesses (*more* than 3 days)
- Treatment for a medical condition
- Pregnancy-related absences
Case study: Fred’s Bad Back

• Fred calls into his manager before his shift to report off work
  • Reports that he has been dealing with a bad back and won’t be in today
  • Next day: Calls off sick again (says it’s the “same thing as yesterday”)
  • He reports to work the following day

• Is the two-day absence covered by the FMLA?
Employer’s Duty to Inquire Further

• “The Employer may find it necessary to inquire further to determine if the leave is because of a serious health condition . . .”  29 C.F.R. 825.302(c)

• Fairly broad right to talk directly to employee, have right to know:
  • **Medical facts:**
    • What is reason for absence?
    • Treatment or unplanned absence?
    • Have you previously taken leave for this reason?
  • Time periods involved (start and expected return)

• Questionnaire/script: Discuss intake during training
That’s What They Can Ask, but What Should They Ask?

- Does the supervisor need to know? If not, don’t tell the supervisor!
- In centralized leave operations, let TPA/leave ops obtain the medical info
- Consider training on a short script. Some elements:
  - If you feel you may require a leave, contact [NAME / NUMBER]
  - Explain: no need to talk to the supervisor about it, and
  - That the supervisor is now out of it
    - Must use the proper channels (business processes); the supervisor will not follow up
Handling the Employee who Requests FMLA Leave and Walks Off the Job

- How do you respond to employees who request FMLA leave after they already have arrived?
- Think back to the *script*
  - Reason for leave
  - When did condition begin?
  - What brought it on? (In other words, why an issue now?)
  - Consider additional break, accommodations to keep them at work
- Should they report to HR before leaving?
Leaving Early for Doctor Appointments

- Scheduling expectations should be set up in advance
  - Once local HR/manager know of potential appointments, scheduling expectations should be set in advance to avoid surprises
  - Advise employee of notice requirements and enforce them

- What is appropriate manager response for a tardy request?
  - What are the doctor’s office hours?
  - Can this be scheduled around work day? If not, why not?
But Always Include a Very Specific Directive to Managers

• FMLA process is triggered by the employee:
  • Provide sufficient information to make employer aware of need for FMLA-qualifying leave
  • Not required to refer to F-M-L-A

• Requests for leave that *may* be covered by FMLA **must** be reported
  • **Signs** of a serious health condition (*not only lengthy absences*)
  • Focus in on comments from employees
Everyday with the ADA Americans with Disabilities Act
Recognizing an Accommodation Request

What is an accommodation request?

- When an applicant or employee requests a change at work for a reason related to a medical impairment
- Can it be signs of behavior change? Yes!
What Triggers an ADA Request?

- Notes from health care providers
- Knowledge of disability benefits
- Worker’s compensation injuries
- Use of mitigating measures such as medication, medical equipment, low vision devices, prosthetics, hearing aids, mobility devices, assistive technology, etc.
- Discussion with employee regarding issues performing functions of the position
- Email request for assistance due to physical or mental issues
- Prolonged or frequent absences
Recognizing an Accommodation Request

An employee is disciplined for poor performance. In response, he says “it’s because I have depression and I can’t concentrate with all these distractions.”

Is this an accommodation request?
“Is there anything we can do to support you in performing job duties or meeting performance requirements?”

- No mention of disability or accommodation
- No worrying about ADA medical inquiry
- Extends support
- Opens the door to engage in the interactive process
- Good management practice overall
Type Two: The Lazybones
Call Me . . . Maybe?

- Company policy: Employee must call in all absences
- Eugene has an FMLA leave for back pain, etc.
- And he does call . . . sometimes. And sometimes he just texts his supervisor.
- Eugene’s texts did not follow policy but still may be an acceptable “method of communication” due to manager’s pattern of accepting them.

_Hudson v. Tyson Fresh Meats, Inc. (8th Cir. 2015)_
Case Study: Clancy is Clueless

• Terrence needs leave for sickle cell anemia and diabetes.
• His manager, Clancy says: he could make a written application for FMLA.
• Terrence doesn’t apply but keeps telling Clancy of his absences. Clancy on notice but doesn’t follow up with HR.

Is Clancy’s employer on notice of an FMLA request?
Case Study: Clancy

- Terrence needs leave for sickle cell anemia and diabetes.
- His manager, Clancy says: he could make a written application for FMLA
- Terrence doesn’t apply but keeps telling Clancy of his absences. Clancy on notice but doesn’t follow up with HR
- Answer: Yes. Because of Clancy’s behavior.

*Preddie v. Bartholomew Consol. Sch. Corp. (7th Cir. 2015)*
Also, Can’t Hide Behind Policies . . .

Actual knowledge trumps failure to follow policies

• Employee’s son made multiple phone calls regarding need for leave. Employer held to have known and assessed liquidated damages.

• Jury: no good basis for termination

• Lost wages and liquidated damages over $284,000

Training Lazybones

- First, What we just said about telling the employee to use the proper channels – do that.

- What if the employee won’t contact the leave team? Or tells the supervisor everything?

  Supervisor should still be trained to report the information to the responsible center/division.
Training Lazybones

• What if the supervisor *is* responsible for the leave?
  ▪ Supervisor needs a standard set of questions to ask
  ▪ Does supervisor need to ask about the medical condition? Not necessarily. Could come on the medical certification.

• Regardless, train the supervisor to close with:
  "Is there anything else you’d want me to know?"
Type Three: The Head Stuck in the Book
Case study: Fred’s IBS

• Fred is one of your direct reports
• Suffers from irritable bowel syndrome
  • You know that he will be absent 2 days/mo; 1 day ea.
  • Past three months:
    – 3x/2x/4x
    – Almost all on M or F
• Recently, he requested a vacation day that was denied, but then called off FMLA on the same day

Is there any problem here?
Manager’s Role in Patterns of Absenteeism

• **Deputize** Your Managers: *You are our eyes and ears!*

• Key in on patterns:
  • Excessive frequency, duration
  • Friday/Monday absences
  • After a denied vacation day
  • Extending holidays
  • Outside activities conflicting with work

• **Work with HR**: Manager must know what to do when these patterns occur. Where do you want them to go?
How Do You Respond?

• Employee working other job or playing recreational activity

• Coworker informs you about the situation, upset that they have to carry the load while employee on leave
Responding to Patterns of Absenteeism

- **Inform HR!**
- In response, HR will:
  - Gather facts from employee reporting conduct (and may need your help in doing so)
  - Interview other employees with knowledge
  - Discuss directly with employee
  - Determine if there is an “honest belief” that the employee is/was engaging in misuse of FMLA
Type Four: The Over-sharer
The Manager Said *What*?

Your manager receives a leave request that may be protected by the FMLA/ADA. In response, your supervisor:

- Responds that the employee has taken “too many days off.” *Troiano v. Cty. of Allegheny* (W.D. Pa. 2017)
- Makes comments about the insurance costs related to the leave. *Yeger v. Inst. of Culinary Educ., Inc.* (S.D.N.Y. 2017)
The Manager Said *What?*

- **Brenda**, 15-year employee; needs leave for hysterectomy.
- **Boss:** “Not a good time to take leave,” urges her to read the book titled, *No More Hysterectomies*.
- During leave, Brenda learns partner has cancer.
- **HR** calls Brenda: RIF’d b/c client contract lost.
  – Termination might be a “blessing in disguise” . . . “would not be able to give 100% to her job anyway.”

*Drew v. Quest Diagnostics (S.D. Ohio 2012)*
You kept your pregnancy from me . . .

Jersey Mike’s:

– Pregnant candidate, hired
– Days after she starts, she tells her manager that she’s pregnant
– Manager responds with this text:
The Examples Continue . . .

Sent an email saying “your continued absence compromises our work”


Discloses his condition to his coworkers at a staff meeting. When he returns, his coworkers make obscene gestures about it.


Managers emailing each other about having a “back up plan” and needing to terminate employee.

*Benz v. Crowley Maritime Corp.* (11th Cir. 2018)

“Move forward with termination . . . Submitted a request for medical leave.” Our “Jake” example.

*Stewart v. Wells Fargo* (11th Cir. 2017)
Training the Over-Sharer

- Train the supervisor to react calmly and with empathy
  - Consider role playing
  - Supervisor should keep emotional response in check

- Consider a practiced, standard response
  - For example: “The company and I fully support your ability to take leave when it’s necessary . . . please let me know how I can be of help”
  - In particular where there is a history of poor, impulsive reactions (e.g., Ugggh!)
And this, too!

**Shouldn’t**
- Talk to coworkers and subordinates about the details
- Email employee, or anyone, about the effect the leave will have
- Reference the leave in the employee’s performance review
Type Five: The Badgerer
Nope.
Not a badger.
A badger-er.
Work During FMLA Leave

- Joan, manager in Ethics Department
- Requested time off – removal of cyst from her neck
- During two-month FMLA leave, employer required her to perform 20 to 40 hours of work updating compliance cases, revising a safety review project and dropping off files at the office
- Returns to work, resigns
- **FMLA problem?**

*Smith-Schrenk v. Genon Energy Services (S.D. Tex. 2015)*
Work During FMLA Leave

- Tammy, Assistant Director at senior living center
- FMLA leave to care for husband after surgery
- Employer called her during leave:
  - Between three and ten times to discuss work-related matters
  - One call discussed hiring of Assistant Residence Director
  - Each of the calls lasted between five and thirty minutes
- Tammy sued, alleging that employer interfered with her FMLA leave by requesting that she work during her leave
- **FMLA problem?**

  *Bryant v. Dept. of Aging and Disab. Svcs* (5th Cir. 2015)
Work During FMLA Leave

• **Joan**: Although there is no right under the FMLA “to be left alone” or be allowed to skirt the employer’s “discrete inquiries,” *asking or requiring an employee to perform work while on leave can constitute interference*.

• **Tammy**: Limited number of calls cannot reasonably be considered as interfering with an employee's FMLA leave. Also, no clearly established law prevented employer from occasionally calling employee while on leave.
Training the Badgerer

**Cannot:**

• Condition continued employment on completing work while on FMLA leave
• Coerce or require an employee to work while on FMLA leave

**Can:**

• Contact an employee on FMLA leave to request a password to access a file or locate paperwork
• Request update on where a particular matter was left
• Ask to pass on institutional knowledge
Training the Badgerer

- **General rule**: Leave employee alone!
- If the supervisor must reach out, contact HR first
- Any communication about work assignments:
  - Be concise
  - Not require a significant amount of time and
  - Not require employee to travel to the workplace
- If employee agrees to work:
  - **Must be voluntary**: employer should communicate that the work is not required
  - **Document** any voluntary agreement
  - **Compensate** to avoid wage and hour issues
Type Six: The Troublemaker
So Much for Those HR Policies . . .

• Steve, 18-year “top notch [sic]” employee, intermittent leave for a neck injury.
• Denied promotion, bad performance review for absenteeism.
• Steve involved in a dangerous safety incident and admits fault!
• Six managers conclude (conspire?) to fire him.
• Never asked for his side of the story and were inconsistent on treatment of the safety violations of others.
• Steve prevails on FMLA and ADA claims

Returning Employee to Work

• Rosana, customer service representative
• Back injury, diagnosed with “quadratus lumborum myofascial pain”
• Took FMLA leave for just over 2 weeks, and upon return, hours reduced to 32 hrs. per week
• Terminated several months later for “inappropriate conduct” because of a difficult relationship with a new direct manager who had assumed the position a month earlier
• Equivalent position: Did employer have legit reason for reducing hours upon Rosana’s return? Jury must decide

Jones v. Aaron’s Inc. (11th Circuit Sept 2018)
Supervisors Violating Policies and Treating Employees Differently

• FMLA claims against HR Director herself, as an individual, allowed because she “played an important role” in and had “sufficient control” over firing.
  – *Graziadio v. Culinary Institute of America* (2d Cir. 2016)

• “Cat’s paw” liability where lower-level supervisor bullied plaintiff regarding her work and her leave.

• $55,000 settlement for providing (not leave) accommodations for other non-disabled employees, or in this case, non-pregnant employees
  – *EEOC v. First Call Ambulance Svc, LLC*, (M.D. Tenn. 2016)
Training the Troublemaker

3 Things:

• Again, train them not to say stupid stuff.
• HR, anytime there is a leave involved, consider that a “red flag.” Look that case over twice!
• Manager should be documenting what happened. Make sure you review it. May reveal bullying, bad decisions, etc.
Ensure Your Training Addresses These Six Issues

The Space Case  
Know what constitutes an FMLA request. Forward to the right people!

The Lazybones  
Don’t sit on information. Follow up with administrator.

The Head Stuck In the Book  
Be our eyes and ears for FMLA misuse.

The Over-sharer  
Control yourself! 😊 Provide script on what to say.

The Badgerer  
Don’t bother FMLA users. If you must, be cautious and considered.

The Troublemaker  
Keep them out of it! Pay extra attention if they’re involved.
Leave Law Insights and CALM

Leave Law Insights provides subscribers regular updates on any leave of absence legislation that has been signed into law. Our analysis will cover paid and unpaid leave laws and ordinances at the federal, state, city and county level.

The Accommodations and Leave Management (CALM) Service gives employers and TPAs timely access to an innovative and experienced attorney dedicated to assisting employers in effectively managing employees with medical conditions.
Can an Employer Require That an Employee Submit FMLA Certification from a Specialist to Support the Need for FMLA Leave?

By Jeff Nowak on November 4, 2016
Posted in Medical Certification

When it comes to FMLA medical certification, my clients have many complaints.

One beef, in particular, is vague medical information they receive on a certification completed by the employee’s primary care physician. This is particularly true where the employee’s mental health is at issue. Employees (rightfully) complain that they deserve medical information from a specialist who is far more knowledgeable about the employee’s specific medical condition. As a result, my clients ask me whether they can require that the employee submit a specialist certification or fitness-for-duty certification from a specialist.

I have been a bit reluctant to give the green light. Until now.

Facts

Take the case of Erica, a community outreach worker for the City of Milford. Erica had a knack for taking a leave of absence after she was disciplined or coached about her performance. Coincidence, I’m sure. On one such occasion, Erica requested a continuous leave of absence due to “severe anxiety.” In support of her leave, Erica submitted certification from her primary care doctor, who indicated that Erica was “under care of psychiatrist and therapist.”

Given the psychiatric nature of the problem that led to Erica’s leave of absence, the City’s HR Director required that Erica submit a “new” certification from her “treating psychiatrist.” Even more, she told Erica that she also would be required to provide fitness-for-duty certification from the same psychiatrist to confirm that she is able to perform the duties of her job at the conclusion of her leave.
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Six Ways Your Managers are Causing FMLA & ADA Lawsuits, and How to Train Them to Stop