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EMPLOYMENT LAW

Summary Judgment Granted Despite Employer's Questionable 'Methodology'

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Special to the Legal

It is an axiom of employment law that an employer's decision to terminate an employee does not need to be "right," but only needs to be based upon its reasonable and nondiscriminatory belief that the employee's behavior warrants discipline. This was most recently illustrated in the case of *Beishl v. County of Bucks*, No. 18-2835, 2910 U.S. Dist. LEXIS 158549 (E.D. Pa. Sept. 18, 2019), where the court granted summary judgment to the employer while questioning the "methodology" of its analysis.

EMPLOYEE NEEDS FMLA LEAVE

Matthew Beishl began his employment with Bucks County in 2006 and was promoted to the position of groundskeeper in 2010. Years before he began working for the county, Beishl was diagnosed with an esophageal condition that caused swelling problems, vomiting and chest pain intermittently.

Beishl applied for, and was granted, intermittent FMLA leave in 2015, but was disciplined in early 2016 for having taken more leave than he had been approved for and for failing to report to



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the third-party administrator all of the days that he called out. He received a five-day suspension and final warning for this behavior.

Nevertheless, Beishl was approved for intermittent leave throughout 2016 and CIGNA, the third-party administrator, extended his intermittent leave through mid-June 2017. Moreover, because Beishl was out for a block of time in January 2017, he was approved continuous FMLA leave from Jan. 5, 2017, until mid-February 2017.

In addition to his work for the county, Beishl played in a rock band called Flabbergasted. In January 2017,

while Beishl was on continuous FMLA leave, his co-workers reported that they had seen Facebook posts about band performances taking place on "days that he was out." There were also rumors that Beishl was taking days off "surrounding different sporting events in Philadelphia." Based upon these reports, the county began an investigation into "whether the coincidence between Beishl's FMLA leave days and the other events created a pattern suggestive of a violation of FMLA policy."

INVESTIGATION INTO POSSIBLE FMLA ABUSE

Ultimately, the county conducted an extensive investigation into the reports of Beishl's absences, including color-coded calendars (with different colors for holidays, sporting events and concerts), which, when compared with Beishl's absences, revealed that three Flabbergasted concerts occurred while Beishl was out under FMLA, one concert took place the day after an FMLA-leave day and one took place on a day on which Beishl took excused leave without pay. One of the concerts was held on a day during Beishl's continuous FMLA leave in January 2017. Moreover, the calendar showed 10

occasions when Beishl took leave before, on, or after, the day of an Eagles game. Based upon this apparent pattern of “FMLA leave abuse and potential fraud” Beishl was terminated in May 2017. Beishl subsequently brought suit claiming that he was retaliated against for having taken FMLA and discriminated against on the basis of his disability. Following the close of discovery, the county moved for summary judgment.

HONEST BELIEF RULE

The court began its analysis by noting that in FMLA retaliation cases, an employer may rebut an assertion of pretext by demonstrating that it

The case again highlights the importance of an employer’s legitimate justification for taking an employment action.

had an “honest belief” that the employee had engaged in the behavior for which he was disciplined/terminated. Specifically, the court cited the U.S. Court of Appeals for the Third Circuit decision in *Capps v. Mondelez Global*, 847 F.3d 144, 153 (3rd Cir. 2017), in finding that “the question is not whether the employer’s reasons for a decision are ‘right but whether the employer’s description of its reasons is honest.’” It can be fairly observed that anytime a court begins its analysis with a citation to this premise, summary judgment is likely to follow. This case was no exception.

Beishl sought to demonstrate pretext by factually attacking the county’s calendars noting, in part, that the “plaintiff played with Flabbergasted and did not take FMLA leave on more occasions” than he played and took leave. Moreover, Beishl argued that the two days on which he played with his band and took FMLA leave were easily explained. The court rejected this argument noting that “at most this pokes holes in the county’s methodology which demonstrated that the report on which the county relied in terminating his employment was less than perfect and less than ambiguous.” What Beishl failed to do, however, was to show that “the calendars were so implausible or incoherent that they were clearly a pretext for discrimination.”

To the contrary, the court found that the county had an honest belief “rightly or wrongly—that an individual who was capable of screaming rock lyrics into a microphone in a bar until the small hours of the morning was capable of coming to work that day or the day before.” As such, the court granted summary judgment in favor of the county on Beishl’s FMLA retaliation claim.

ADA CLAIM ALSO FAILS

Beishl further argued that the county violated the ADA and PHRA by terminating him because the symptoms associated with this esophageal condition were unpredictable and lead him to “call out sick at inopportune times.” The court granted summary judgment to the county on this claim as well, finding that there was no evidence to corroborate that the county or any of its managers, held any animosity toward

Beishl’s esophageal condition or its symptoms. Beishl attempted to demonstrate such animosity by pointing to the deposition testimony of one of his managers in which the manager questioned “if the issue is with his throat, how could he be a lead singer in a rock group?” The court found, however, that “this does not express animosity or negative view about Beishl as an employee with a disability, as it might have if the manager had said: ‘If the issue is with his throat, how could he be a groundskeeper for the county?’”

The case again highlights the importance of an employer’s legitimate justification for taking an employment action. While the calendars upon which the county relied were less than perfect, they appeared to have been exhaustively prepared and relied upon without any apparent discriminatory animus. It is not difficult to imagine, however, that had the county just summarily noted overlap between Beishl’s concerts and his FMLA days, without “showing its work,” the strength of the argument may have been diminished and summary judgment may well have been denied. •