

Lessons Learned – Engaging In Protected Activity Does Not Shield An Employee From Termination

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Navigating the FMLA, the ADA, and a myriad of state laws poses challenges for even the most knowledgeable HR professional. But as one court recently reminded us in *Ibewuike v. The Johns Hopkins Hospital*, employers can hold employees accountable for misconduct (such as violating leave policies) unless of course, it would be reasonable, under the facts and circumstances of the particular situation, to excuse the misconduct. In *Ibewuike*, the employee applied for leave under the FMLA in connection with the anticipated birth of her child. Johns Hopkins approved her request. Ibewuike then experienced complications with her pregnancy, and amended her FMLA request to cover absences in connection with the complications. Johns Hopkins approved that request, too. Just prior to exhausting her FMLA leave, Ibewuike's manager sent her a letter, advising Ibewuike that she could apply for a medical leave of absence (since Ibewuike had used most of her available FMLA prior to the birth of her child due to the complications associated with her pregnancy). Pursuant to John Hopkins' leave of absence policy, employees were prohibited from engaging in paid employment during the period of leave, without prior written permission from their manager. Despite this prohibition, Ibewuike accepted employment with another hospital, and when Johns Hopkins found out about it, it promptly terminated Ibewuike's employment. Ibewuike then sued John Hopkins, under a variety of statutes, including the FMLA. As to her FMLA retaliation claim, the court found that Ibewuike could not prove that her termination was pretextual because she admitted that she accepted paid employment with another hospital, which was specifically prohibited by the applicable leave policy. The lesson learned here – albeit a reminder – is that employees who engage in protected activity enjoy no greater protection than employees who have not engaged in protected activity. Put another way, they are not shielded from adverse employment actions just because they have exercised their rights under an applicable statute. With that said, before taking an adverse employment action, it is advisable to consult with your legal counsel because some courts find that timing alone is sufficient to establish pretext.

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