

FMLA: What If Things Go Better Without You?

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The Sixth Circuit Court of Appeals' recent decision in *Saulter v. Detroit Area Agency on Aging* highlights a very common scenario – the employer decides that an employee is not necessary when the employee is on leave. Leaving aside the obvious management question (*Why it did it take the employee being on leave for you to figure that out?*), of course it is unlawful under the Family and Medical Leave Act (FMLA), Americans with Disabilities Act (ADA) and a host of state laws to terminate an employee because the employee is using leave. But what if the leave causes the employer to realize the employee is unnecessary? In *Saulter*, the federal appeals court for Kentucky, Michigan, Ohio and Tennessee overturned a summary judgment in the employer's favor for further litigation to determine whether an employee would have been terminated even if she had not taken FMLA leave. While she was on leave, her employer decided to rearrange her duties, including to contractors and invited her to apply for other positions including the new contractor position. Of course, an employer could have made this decision without regard to the leave and just have happened to do so during the leave. The case underscores the inherently tricky nature of the timing of such a decision, though. How *Saulter* plays out remains to be seen, but employers are reminded that any adverse decision close in time to an employee leave warrants prior consultation with counsel to minimize the risk of resulting litigation.

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