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EMPLOYMENT LAW

The FMLA Does Not Require a Warm Welcome Back to Work

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Special to the Legal

Must an employer engage in pleasantries and avoid critique of an employee's pre-Family and Medical Leave Act leave work performance when an employee returns to work after an FMLA leave? In *Checa v. Drexel University*, No. 16-108, 2016 U.S. Dist. LEXIS 83524 (E.D. Pa. June 28, 2016), the court found that the FMLA does not require an employer to forget about pre-leave performance deficiencies or deliver them in a courteous manner.

The plaintiff, Debra Checa, began her employment with defendant Drexel University College of Medicine in 2010. In 2014, Checa sought and was granted FMLA leave to have carpal tunnel surgery. Her leave was scheduled to end Sept. 14, 2014. Checa's mother passed away while Checa was on leave and recovering from her surgery, according to the opinion. Consequently, Drexel approved Checa's request to extend her leave.

Return to Work With No Condolences or Niceties

On Sept. 16, 2015, Checa returned to work and met with Christina



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Zervoudakes, the person who assumed Checa's work responsibilities during her leave, and Kathy Lally, the person who provided administrative support to the department wherein Checa worked. The purpose of the meeting was to discuss transitioning work back to Checa and to review the tasks that Checa did not complete before her leave commenced.

Neither Lally nor Zervoudakes gave Checa a warm welcome or offered Checa condolences on her mother's passing. After receiving a list of tasks that she failed to complete despite agreeing to do so before commencing

her leave, Checa became upset, stood up and said, "I quit," according to the opinion. Thereafter, Checa returned to her office and called her supervisor, Dr. Carolyn O'Connor, informed her of the meeting, and said "I quit" again. To be sure that her point was made, Checa sent an email to O'Connor later that day confirming her resignation.

Buyer's Remorse: Regret Over Resignation

After having expressed her resignation on three separate occasions, Checa attempted to retract her resignation the next day. Drexel denied her request.

Subsequently, the plaintiff brought suit alleging FMLA retaliation and constructive discharge arguing that the "first day back" meeting was a planned attack and Drexel's retaliatory intent motivated its refusal to accept her attempt to rescind her resignation. Drexel moved for summary judgment on the basis that Checa failed to establish a prima facie case of FMLA retaliation.

FMLA Does Not Require a Warm Welcome Back

While Drexel conceded that the "first day back" meeting was a

disciplinary form of employee counseling, the court found that the meeting did not constitute an adverse employment action as it did not alter the terms of conditions of Checa's employment. Reciting some of the indicia of adverse employment actions, the court noted that the meeting did not impact Checa's ability to work or advance in her career nor did Checa suffer a change in job title with less prestige or a suspension of pay. Of import to the court's decision was the fact that Lally did not have disciplinary authority over Checa. Also key was the fact that Checa did not receive a formal or written performance evaluation but merely received criticism about her failure to complete assignments before the commencement of her leave. Directly addressing Checa's dissatisfaction with the alleged lack of empathy shown to her when she returned to work, the court expressly noted that Lally and Zervoudakes' failure to exchange pleasantries with Checa did not amount to an adverse employment action.

No Constructive Discharge

With respect to her claim of constructive discharge, Checa argued that Drexel had a premeditated plan to discipline her the day she returned from leave and the first day back meeting amounted to constructive discharge. Rejecting this argument, the court noted that one brief meeting involving criticisms of Checa's pre-leave work, without pleasantries or condolences, does not rise to the level of creating conditions so intolerable that a reasonable person subject to them would feel compelled to resign. In fact, as the court pointed out, the

conditions of Checa's employment could not have been intolerable as she changed her mind the next day and wanted to stay employed with Drexel.

Refusal to Accept Rescission of a Voluntary Resignation

Rejecting Checa's argument, the court reasoned that under the facts, which did not support a claim of constructive discharge, Drexel's decision not to allow Checa to rescind her resignation was not an adverse employment action given that Checa had already resigned, and Drexel's decision could not alter the privileges of her employment, deprive her of employment opportunities or otherwise adversely affect her status as an employee.

In addition, the court found no causal link between the conclusion of Checa's FMLA leave and Drexel's decision not to allow her to rescind her resignation. The court noted that although the timing between Checa's leave and Drexel's decision was less than two days, the close temporal proximity was prompted by Checa's own actions. Further, Checa's repeated resignation served as an intervening event to sever any causal link between Checa's FMLA leave and Drexel's decision not to allow Checa to rescind her resignation.

Inability to Accept Criticism, Unprofessional Resignation

The court noted that even if Checa had established a prima facie claim of retaliation, Drexel had advanced a legitimate nondiscriminatory reason for the alleged adverse actions—namely, Checa's inability to accept constructive criticism and her

unprofessional resignation. Checa's reliance on a statement that Drexel "set her up" could not establish pretext, as mere rumors could not overcome Drexel's legitimate business reasons, particularity where there were no allegations that anyone said anything negative about Checa's FMLA leave.

Checa reminds employers that an employee taking FMLA is to be treated the same as if he or she had not taken the leave. As such, employers can, and should, address pre-leave performance deficiencies if they were not able to do so because of the employee's leave. Further, like Title VII, the FMLA is not a civility code and there is no particular "empathy bar" over which an employer must pass upon the employee's return to work. Finally, employers are often in a quandary over how to handle an employee who resigns and then attempts to rescind his or her resignation. In this case, Checa's impetuous resignation in a counseling meeting showed poor judgment and a diminished chance of long-term employment success. In such a circumstance, knowing that there is no legal expectation that the resignation can be rescinded should empower employers to do what is most likely in their interest by accepting the resignation. •