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WHEN EMPLOYEE'S TRIP TO THE BEACH MAY NOT SUPPORT A SUSPICION OF FMLA FRAUD

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Employers are not obligated to tolerate employee misuse of FMLA leave. Examples abound in which an employer learns – often through an employee's social media posts or through information from an employee's co-workers – that an employee on intermittent FMLA leave has been having a good time while absent from work, such as taking a trip to the beach (or Las Vegas, Cancun, ….), playing golf, going fishing, etc. In those situations, when an employer takes action to discipline or terminate the employee after conducting a reasonable investigation and reaching an honest belief of FMLA fraud, the employer will often successfully defeat a resulting FMLA retaliation claim (and, often an FMLA interference claim as well).

The case of *Meyer v. Town of Wake Forest*, No. 5:16-CV-348-FL, 2018 WL 4689447 (E.D. N.C. Sept. 28, 2018), however, provides an example of when an employee going to the beach during FMLA leave may *not* provide good grounds for an "honest belief" of FMLA fraud. In *Meyer*, the employee was approved for intermittent FMLA leave both to care for his wife who was recovering from childbirth and to bond with his newborn son. A co-worker reported to the employer that, while on approved FMLA leave, the employee had been to the beach with his family, and that he also planned to go with them to the state fair. Based on the employee's subsequent admission that he had engaged in these activities and that he had recorded his time as sick time under the employer's paid sick leave policy, the employer terminated his employment for intentionally misusing his leave.

When the employee sued for FMLA retaliation, the employer argued on summary judgment that, because the employee admitted going to the beach, he had misused his FMLA leave and therefore had not engaged in "protected activity" under the FMLA. The court rejected this argument, noting that, with respect to *baby-bonding* FMLA leave, nothing in the FMLA suggests that such leave is "geographically restricted." In other words, so long as the employee is actually spending time with the newborn or newly placed (for adoption or foster care) child, nothing in the regulations dictates how or where such bonding may occur.

Further, while identifying one's time at the beach as "sick leave" under a sick leave policy may in other situations support a conclusion of dishonesty and provide a legitimate basis for termination (such as where paid sick leave may only be used when the employee is actually sick), the court

found that such a conclusion was not necessarily warranted under the facts in *Meyer*, because the employee's supervisor had told the employee that he was *required* to exhaust all paid sick and vacation leave before taking the remainder of his FMLA leave unpaid. The fact that the same supervisor then made the decision to terminate the employee's employment for recording his leave time as paid sick leave provided evidence of "inconsistency" which could allow a jury to find that the rationale for termination – misuse of the paid sick leave policy – was unworthy of credence and instead was a pretext for FMLA retaliation.

Moral of the story: When faced with facts that suggest FMLA fraud, consider all of the circumstances before making a decision to terminate. The analysis should include not only a reasonable investigation, but also consideration of the type of FMLA leave for which the employee is approved, along with how related leave policies and supervisor statements may impact the conclusion.

Bryan Cave Leighton Paisner LLP has a team of knowledgeable lawyers and other professionals prepared to help employers assess best practices under FMLA. If you or your organization would like more information on FMLA or any other employment issue, please contact an attorney in the Employment and Labor practice group.

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