

Employee's FMLA Claim Dismissed After Taking a Trip to Cancun

By [Jeff Nowak](#) on May 24, 2011



Employees should think twice before setting off on a Cancun vacation while out on FMLA leave. In an FMLA decision that smacks of pure common sense, a federal court has upheld an employer's reasonable work rules that restricted an employee's travel outside the immediate vicinity while on FMLA leave. [Pellegrino v. CWA](#) (pdf).

The Facts

Denise Pellegrino, a employee of the [Communication Workers of America](#) (CWA), informed CWA that she needed to undergo a hysterectomy. CWA approved Pellegrino for FMLA leave, an absence which ran concurrently with paid sick leave. Shortly thereafter, Pellegrino scheduled her surgery, and both her unpaid FMLA leave and paid sick leave began.

About two weeks after surgery, Pellegrino took off for Cancun, Mexico for one week. Pellegrino did not inform CWA that she would be leaving the country, nor did she request permission to travel. This was significant because CWA's work rules specifically required employees to "remain in the immediate vicinity" of their home while utilizing sick leave, unless they were seeking treatment or attending to "ordinary or necessary activities directly related to personal or family needs." An employee also could leave the immediate vicinity if they received express permission from CWA.

CWA found out about Pellegrino's trip to Cancun and terminated her employment because she traveled to Cancun while on FMLA and disability leave in violation of CWA's leave policies and work rules.

The Court's Decision

Pellegrino sued, claiming that CWA's decision to terminate her while on leave interfered with her ability to use FMLA leave. Conversely, CWA argued that it terminated Pellegrino's employment not because she was on FMLA leave, but because she took unapproved travel to Cancun while utilizing sick leave. As such, her conduct violated the Company's leave policies and work rules. According to CWA, it would have terminated her employment whether or not she was on FMLA leave.

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Notably, although the court agreed that Pellegrino's leave was protected by the FMLA (and that CWA had, in fact, provided FMLA leave), it held that CWA had the right to enforce its own leave policies, which in this case, required that Pellegrino receive permission to travel outside the immediate area. The Court reasoned that Pellegrino's conduct would have been improper whether or not FMLA leave was involved. According to the court, this is all the more true where an employer has adopted policies designed to prevent FMLA abuse:

[T]he FMLA does not shield an employee from termination if the employee was allegedly involved in misconduct related to the use of the FMLA leave . . .

Further, no reasonable jury could find that an employer acts illegitimately or interferes with FMLA entitlements when that employer terminates an employee for taking a week-long vacation to Mexico without at least notifying the employer that her doctor had approved the travel or that she would be out of the country.

Insights for Employers

It is worth comparing this case with the [Tayag v. Lahey Clinic Hospital](#), in which an FMLA claim was dismissed after the employee traveled to the Philippines to meet with a faith healer *and* spend significant time visiting family. In *Tayag*, the court dismissed the FMLA claim largely because the plaintiff was not seeking treatment, but rather, taking a vacation. Here, the court found that a Cancun vacation could be consistent with the need for FMLA leave. A scary precedent, I think.

Nevertheless, in addition to serving as good precedent for employers, this decision reminds us of a few golden rules when it comes to FMLA administration:

1. Obtain complete and sufficient medical certification regarding an employee's serious health condition, including information about treatment plans (which very well could tip you off to the possibility that the employee may be looking to schedule a trip to a remote sandy beach while on FMLA leave)
2. Enforce call-in procedures. If the employee is required by policy to call in daily or at regular intervals, enforce the policy!
3. Apply all policies consistently with respect to employees taking FMLA *and* non-FMLA leaves of absence.
4. Communicate with employees to obtain information about their serious health condition, the need for leave, the duration of leave and their expected return to work. For an example of how this is done correctly, follow the employer's lead in [Righi v. SMC Corp.](#), which we highlighted a few months back.
5. As CWA did here, conduct a thorough investigation and allow the employee to explain the trip to Cancun before making the knee-jerk decision to terminate. Although your failure to do so

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likely would keep your employment attorney in business, we want to make sure you stay in business first.

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