

FMLA Insights

Guidance & Solutions for Employers

Employees Take Note: Showing Pictures of Your Boyfriend's Privates Will Doom Your FMLA Lawsuit (or Any Other Lawsuit)

By [Jeff Nowak](#) on November 28, 2011



Before you read this post, *cover your eyes!*

Cynthia Adams was a registered hospice nurse for [Fayette Home Care and Hospice](#). According to one of her hospice patients, Adams apparently showed him and his wife three pictures of her boyfriend's genitals, the photos of which were stored on her cell phone. Not surprisingly, the patient told another nurse from Fayette about the incident and asked that Adams not come back.

In responding to this incident, however, Fayette was faced with a bit of a Human Resources quandary: Adams had just begun a leave of absence taken under the Family and Medical Leave Act. *These fact patterns never are simple, are they?* So, did Fayette investigate and terminate Adams' employment immediately (if the alleged facts are indeed true), or wait until Adams returned from FMLA leave (*ahem*, two months later) to terminate employment? In this instance, Fayette decided to wait until Adams' FMLA leave ended before confronting her with the allegations and terminating her employment.

Fortunately for the employer, this story has a happy ending. Despite Adams' claims that Fayette retaliated against her because she took FMLA leave, a federal court quickly dismissed them, a decision that was upheld by the Eighth Circuit Court of Appeals. [Adams v. Fayette Home Care and Hospice](#) (pdf)

In reviewing Adams' FMLA claim, however, the court grappled with this intriguing issue: did Fayette's decision to wait two months until Adams' return to work before calling the incident to her attention and terminating her employment indicate a discriminatory motive on Fayette's part? Thankfully, the Court found no such "sinister motive," finding the following:

that [Fayette] sat on the allegations for two months before reporting them to Adams does not suggest a sinister motive on its part. Fayette knew the full duration of Adams's FMLA leave in advance; if it sought to retaliate, it had no reason to wait until the leave ended. And Adams was recovering from a major surgery during her leave.

Case dismissed.

Insights for Employers

I regularly deal with this "timing" issue in FMLA training I conduct for employers: When do you confront an employee on FMLA leave with evidence of performance issues or (as in this case) deplorable conduct that is uncovered while the employee is on leave? The more conservative approach is the one followed here by the employer: Don't contact the employee while she is on leave, and deal with the issue immediately upon her return to work. What's great about the *Fayette* case is that courts typically will support this approach.

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But is this approach always the most desirable? Other employers would have conducted a swift investigation, contacting Adams while on leave and terminating her employment immediately thereafter because of the egregious conduct here. Clearly, this approach is understandable in light of the facts. So long as the employer conducted an adequate investigation, which would include informing the employee of the allegation and giving them a chance to respond, a court likely would be comfortable with this approach.

However, an employer's approach as to the timing of its investigation and confrontation of the employee should take the circumstances into account. Before rushing to hit the termination button, consider a couple of factors:

1. *How egregious is the conduct?* Surely, the more egregious, the more reason for the employer to act swiftly.
2. *Why is the employee on FMLA leave?* In other words, are we talking bunion surgery or major heart surgery? *Note:* If the employee is in a hospital bed *or could be* at any moment, call off the dogs!
3. *In the same vein, is the employee suffering from a serious health condition that might make it difficult to communicate or prevent them from effectively responding to an investigator's questions (e.g., depression)?* If so, I encourage you to tread lightly and deal with the situation after you have some confidence that the employee can adequately respond to the investigation.
4. *What is the employer's typical practice or policy in these situations?* Employers typically do well in Court when they can establish that they handled the particular situation in the same manner as a similar situation in the past. There are reasonable exceptions, of course, but we should respond to similar situations in the same manner.

For the few (or perhaps one?) who want to hear me blather on about this topic, feel free to listen to our FMLA Insights podcast "[Can We Demote or Terminate an Employee During FMLA Leave?](#)"

I welcome your feedback on how you would handle Fayette's situation above. Do you act swiftly or wait calmly before pouncing...and why?

Now, feel free to *open your eyes*.

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