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## EMPLOYMENT LAW LETTER

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Darryl J. Lee, Editor — Kirton McConkie

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### FMLA LEAVE

## 'Holes' in youth center's defense earn jury trial on FMLA claims

*In Holes, a Newbery Medal-winning novel by Louis Sachar that was later made into a Disney movie, boys at a juvenile detention camp are forced to dig holes in the desert. Although they're told they're digging holes to build character, the real purpose is to find treasure that outlaw "Kissin' Kate" Barlow was rumored to have buried there. Although the case below doesn't have the type of mistreatment that occurred in Holes, it does involve allegations made by a former staff member of a youth resident center that he was unlawfully fired in violation of the Family and Medical Leave Act (FMLA). If his claims are proven at trial, he could end up finding treasure at the youth center's expense.*

### **Supervisor gives lead boot during 'weak knee' week**

William Person worked for Horizon Health Corporation, which operates Copper Hills Youth Center, a residential treatment facility for teenagers with behavioral issues. He began as a mental health associate and was promoted to program lead, which required him to oversee a unit of resident boys and the unit's staff.

During his time as program lead, Person repeatedly complained to his supervisor, Signe Evans, that his unit was short-staffed and about what he believed were inappropriate residents being placed there. Despite his complaints, Evans gave him a positive performance appraisal as late as March 2007, stating that he had "done an excellent job bringing an ineffective unit to a functioning unit," was "very effective" at crisis management, and had "done well despite being short[-]staffed."

However, the youth center claimed that Evans met with Person repeatedly during the spring and summer of 2007 to discuss his job performance, telling him that he needed to provide more structure for unit residents and discipline his staff when they arrived late to work.

An e-mail dated April 10 appeared to support the center's claims that there were ongoing issues in his unit. However, Person claimed the e-mail was fabricated after the fact because (1) the e-mail system normally included a date at the top of the page and this message was dated at the bottom in a different font from the body of the e-mail and (2) the document wasn't placed in his file until after his termination.

In September, Person submitted a request for FMLA leave for knee surgery. The youth center approved his request, and he began his leave on September 28. Evans, who claimed the unit was running more smoothly in Person's absence, decided to fire him. She prepared a document that discussed several issues with his performance, including his unwillingness to implement her feedback, poor management of his staff members, his refusal to take responsibility for the unit's problems by blaming all the issues on understaffing, and his claim that he was working more hours than he actually was. The document was dated October 3.

Interestingly, the document apparently referred to events that didn't happen until October 6, leading Person to argue that it was prepared later and backdated to support Evans' decision to terminate him. On October 6, while still on FMLA leave, Person returned to work. He stated that he was called in because of a riot, although the document Evans prepared stated the riot occurred because of his presence.

On October 16, Evans and the youth center's HR director informed Person that he was being fired. Soon after, he filed a lawsuit in Utah's federal district court. Among other things, he claimed his termination constituted retaliation against him and interference with the exercise of his rights under the FMLA. The youth center asked the district court judge to dismiss the case without a trial.

Kirton McConkie is a member of the *Employers Counsel Network*



## ***Documents prepared in anticipation of litigation suggest retaliation***

Because Person had no direct evidence of retaliation, he sought to prove his case under the *McDonnell Douglas* framework, named after a famous case with the same name. As a first step, he had to make a basic case of retaliation under the FMLA by showing:

- (1) he engaged in protected activity;
- (2) the youth center took an adverse employment action against him; and
- (3) a causal connection exists between the protected activity and the adverse action.

Because Person had taken FMLA leave and was terminated, he met the first two prongs of the test. The third prong, a causal connection between the two events, may be shown solely by temporal proximity when the termination closely follows the protected activity. Because courts have held that six weeks is sufficiently close in time to infer a causal connection, the district court had no difficulty finding sufficient evidence to support a causal connection between Person's FMLA leave and the decision to fire him six days later.

Once a basic case of retaliation was shown, the youth center was required to provide a legitimate non-retaliatory reason for Person's termination. It did so by stating that he was fired for poor management skills and his unwillingness to implement constructive feedback. To reach a trial on his retaliation claim, Person then had to show that the youth center's reasons were merely a pretext (*i.e.*, a cover-up) for unlawful discrimination. He could do that by showing weaknesses, implausibilities, inconsistencies, incoherencies, or contradictions that cast doubt on the youth center's stated reasons. Temporal proximity is relevant, but it cannot show pretext without other evidence.

The district court found that Person presented enough circumstantial evidence to warrant a trial on his claim. The court noted that he was never warned of possible termination and his final performance evaluation was positive. Additionally, Evans claimed that the unit ran more smoothly in his absence, but a riot broke out during the second week of his leave. The court also found there were questions about whether various documents prepared by Evans were backdated to support the termination decision. The court pointed out that documents prepared in anticipation of litigation raise an inference of pretext when the creation date is suspicious. Thus, the court denied the youth center's request, allowing Person an opportunity to present his retaliation claim to a jury.

## ***Same difference with interference***

The district court then analyzed Person's claim that the youth center interfered with the exercise of his FMLA

rights. To establish a basic case of FMLA interference, he had to show:

- (1) he was entitled to FMLA leave;
- (2) an adverse action taken by the youth center interfered with his right to take FMLA leave; and
- (3) the youth center's action was related to the exercise or attempted exercise of his FMLA rights.

Person had a right to FMLA leave for his surgery, and he was fired while he was on leave, so he satisfied the first two conditions. As in the retaliation claim, the requisite nexus between those two events was established by temporal proximity.

Once an employee establishes a basic claim of interference, an employer can escape liability only if it can show that the employee would have been fired even if he hadn't taken FMLA leave. Because there was no evidence that termination was contemplated before Person's surgery and questions remained about when several documents important to the youth center's defense were prepared, the court concluded there were issues about whether it would have fired Person had he not taken FMLA leave. Thus, the court ruled that a trial was warranted. *Person v. Horizon Health Corp.*, 2011 WL 6339709 (D. Utah, December 19, 2011).

## ***'Dig' it?***

Just as digging holes seemed pointless to the resident boys in *Holes* but ultimately was done for the purpose of finding hidden treasure, an employee might find treasure in the form of a judgment if he uncovers enough holes in an employer's reasons for firing him. The risk of possible liability is appreciably greater when an employer fires an employee while he's on FMLA leave or soon after the leave was taken, which is what happened in this case.

Employers that wish to avoid similar pitfalls should carefully consider whether they have sufficient supporting documentation in an employee's file to show that he would have been fired regardless of any FMLA leave. The question in this case: Why didn't the employer fire the employee long before he requested FMLA leave?

Even though a jury must still decide if that's what actually happened, employers should never backdate documents to justify a previous termination decision. As this case illustrates, an employee will be able to get his case to a jury if he raises credible doubts about when important documents were prepared. Employers must be consistent in dating and formatting documents in an employee's file because it is significantly more difficult and costly to climb out of a litigation hole once a court has determined that an employee is entitled to a jury trial on his claims. ♣