



HOW TO DEAL WITH ABSENT EMPLOYEES – APPROVED LEAVE ISSUES

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Agenda

- What are we talking about?
 - UTA Policies
 - Family and Medical Leave Act (FMLA)
 - Americans with Disabilities Act (ADA)
 - Best Practices for Managing Various Types of Leaves/Absences
- Why are we talking about this?
- What do we want you to know?
- Manager Pitfalls

Leave Resources

- UTA Human Resources – Employee Leave Services
 - Policies, FAQs, and forms
- All UTA leaves are based on state and federal laws.
 - FMLA
 - ADA
 - Sick Leave
 - Parental Leave (provided by state statute)
 - Vacation Leave

Why are we talking about this?

- **Supervisors are key players** in leave processes.
- **Supervisors are on the front lines.**
 - Often, first to encounter issues an employee may be having that could implicate leave policies.
- Supervisors are in the position to **set the processes up for success** – or doom it to fail.
 - The attitude and responsiveness of supervisors often determine whether an employee feels that s/he is being treated fairly.
- Supervisors have obligation to employee and to the university to **follow policy and the law.**
 - Failure to do so can lead to **legal liability.**

Why are we talking about this?

“Front-line managers...who are often unaware of what is protected by the FMLA...are uninformed about their role in the process....

They also sometimes engage in improper communication with employees about motives or personal lives, and it's exactly these types of behaviors that can **lead to discrimination and wrongful termination claims** and introduce **liability for organizations.**”

- Helen Applewhaite,
DOL's FMLA Branch Chief



Why are we talking about this?

- **State law requires** the following for each UTA employee:
 - ❑ Time and attendance records;
 - ❑ A record of accrual and taking of vacation and sick leave;
 - ❑ A record showing reasons for leave if other laws require employee to inform the agency of the leave; and
 - ❑ A record showing how the leave is accounted for – i.e., sick, vacation, other paid leave, LWOP or other absence.
- **Failure to report leave violates the law.**
- **As a supervisor, it is your duty to ensure employees are accurately reporting leave!**

Why are we talking about this?

- Federal and state law guaranteed rights and prohibited practices
 - **FMLA:** No interference. No retaliation.
 - **ADA: reasonable accommodations** for qualified individuals with a disability that allows them to perform their essential job functions.
 - Determined in **interactive process** – collaborative, informal process to assess whether an employee's disability can be reasonably accommodated, looks at limitations created by disability and how best to respond to the need for accommodation.

What do we want you to know?

➤ **Supervisors need to know:**

- The importance and general requirements of the statutorily-mandated leaves

- The critical significance of how and what you communicate to employees

- **When to contact HR**

- We are not asking you to be legal experts.

- But, eventually, you may be involved in the processes related to accommodations or intermittent FMLA leave, for example, and asked for input on implementing leave that works for the employee and the institution.

FMLA – Generally

▶ Family and Medical Leave Act

□ Up to 12 weeks (480 hours) of job protected leave *for qualifying events*:

- ✓ New child to family (birth, adoption, foster care);
- ✓ Serious health condition (employee, spouse, child, or parent); or
- ✓ Military related
 - Exigencies (e.g., preparing for deployment)
 - Extended leave (i.e., 26 weeks) to care for serious health condition of injured military

□ **Principle = Job Protection**

ADA - Generally

- ▶ American with Disabilities Act
 - ❑ Prohibits discrimination against the disabled in employment.
 - ❑ Covers employers with 15 or more employees.
 - ❑ Enforced by EEOC.
 - ❑ Mandates broad discretion = assume there is always a disability.
- ▶ **Principle = Allows employee to perform the essential functions of the job with a reasonable adjustment or modification in the work environment.**

The 6 Types of FMLA/ADA Offenders



**The
Space Case**



**The
Lazybones**



**The Head Stuck
in the Book**



**The
Over-sharer**



**The
Badgerer**



**The
Troublemaker**

Reference: "Six Ways Your Managers are Causing FMLA & ADA Lawsuits, and How to Train them to Stop;" Jeff Nowak, Franczek & Radelet, and Matt Morris, FMLA Source; December 12, 2018.

Meet the Offenders

The
Space Case



Knew/should have known there was a medical condition, yet did nothing

The
Lazybones



Knew of the leave but failed to redirect to proper channels

The Head Stuck
in the Book



Does not recognize patterns of FMLA abuse

The
Over-sharer



Failed to respond to the request appropriately

The
Badgerer



Improperly contacted employees during leave

The
Troublemaker



Tainted the termination decision

The Space Case



The Migraine Headache

- Mikyla, registered nurse
- Charge nurses aware of migraine headaches, medication
- Frequent call-offs: some = migraine; some = headache
- Vague attendance logs noting “headache” as reason for absence
- **FMLA Problem:** These facts sufficient to trigger the company’s obligation to investigate further as to whether Mikyla needed FMLA leave

Brown v. Cox Health (W.D. Mo. Jan 2016)



Sick Leave Combined with More Serious Reasons

- Shawn, registered nurse
- Suffered from congenital heart condition
- Left work early to go to ER due to irregular heart beat
- Canceled next two shifts and called in “sick” on another shift
- Doctor’s note: “absence due to heart condition”
- Terminated for violated time/attendance policy
- **FMLA Problem:** employer had enough information about health condition that it should have inquired about need for FMLA leave

Fitzgerald v. Shore Medical Center (D.N.J. March 2015)

“Serious Health Condition” different than “Sick”

- **“Serious Health Condition”:**
 - Inpatient care (i.e., an overnight stay)
 - A period of incapacity for more than 3 consecutive calendar days and “continuing treatment”
 - Any period of incapacity for pregnancy or prenatal care (or prenatal visits, morning sickness)
 - **Chronic serious health condition**
 - Absences for treatment (e.g., chemotherapy)
- For all: mental or physical conditions



SHC or Not?

Typically not SHC:

- Common cold or flu
- Earache
- Upset stomach
- Ordinary dental work
- Non-migraine headaches

Typically are SHC:

- Chronic conditions, cancer
- Depression/mental health issues
- Significant illnesses (*more than 3 days*)
- Treatment for a medical condition
- Pregnancy-related absences

Case study: Fred's Bad Back

- Fred calls into his manager before his shift to report off work
 - Reports that he has been dealing with a bad back and won't be in today
 - Next day: Calls off sick again (says it's the "same thing as yesterday")
 - He reports to work the following day
- Is the two-day absence covered by the FMLA?



Employer's Duty to Inquire Further

- "The Employer may find it necessary to inquire further to determine if the leave is because of a serious health condition . . ." 29 C.F.R. 825.302(c)
- Fairly broad right to talk directly to employee, have right to know:
 - **Medical facts:**
 - What is reason for absence?
 - Treatment or unplanned absence?
 - Have you previously taken leave for this reason?
 - Time periods involved (start and expected return)





Leaving Early for Doctor Appointments

- Scheduling expectations should be set up in advance
 - Once local HR/manager know of potential appointments, scheduling expectations should be set in advance to avoid surprises
 - Advise employee of notice requirements and enforce them
- What is appropriate manager response for a tardy request?
 - What are the doctor's office hours?
 - Can this be scheduled around work day? If not, why not?

With ADA – Remember:

- Your role is to recognize when an employee **may** need assistance.
- What might that look like?
 - An applicant or employee requests a **change at work** for a reason related to a **medical impairment**.
 - Can it be signs of **behavior change**?
 - Yes!

ADA Request Triggers – May Take Many Forms

- Notes from health care providers
- Knowledge of disability benefits
- Worker's compensation injuries
- Use of mitigating measures such as medication, medical equipment, low vision devices, prosthetics, hearing aids, mobility devices, assistive technology, etc.
- Discussion with employee regarding performing functions of position
- Email request for assistance due to physical or mental issues
- Prolonged or frequent absences
- Employee disciplined for poor performance responds, "It's because I have depression and can't concentrate with all of these distractions."

ADA Request Triggers – Your response

- “Is there anything we can do to support you in performing job duties or meeting performance requirements?”
 - No mention of disability or accommodation → no worry about inappropriate medical inquiry
 - Extends support
 - Opens the door to engage in the interactive process
 - Good management practice overall
- Go to HR and let them know what is going on and the information you have gathered; they’ll take it from there.

ADA Request Triggers – Key Take-aways

- ▶ There are no “magic words” an employee must use to put the institution on notice that s/he might need a reasonable accommodation.
- ▶ An employee can put the institution on notice formally or informally, verbally or in writing.
- ▶ You can ask if the employee is making a request for a reasonable accommodation.
 - ▶ You should document this conversation with the employee – in email to employee with copy to HR.

Did my employee just put me on notice that she needs a reasonable accommodation?!?

If an employee, through words or actions, puts the institution on notice that a medical condition may be affecting her ability to perform her job (e.g., mentioning it to a supervisor), the institution should initiate the interactive process.

- ▶ “My therapist recommends I see him once a week, so I may be late to work on days when I have appointments.”
- ▶ “My heart medication is disrupting my sleep, causing me to oversleep and be late for work.”

The Lazybones



Call Me . . . Maybe?

- Company policy: Employee must call in all absences
- Eugene has an FMLA leave for back pain, etc.
- And he does call . . . sometimes. And sometimes he just texts his supervisor.
- Eugene's texts did not follow policy but still may be an acceptable "method of communication" due to manager's pattern of accepting them.

Hudson v. Tyson Fresh Meats, Inc. (8th Cir. 2015)



Case Study: Clancy is Clueless

- Terrence needs leave for sickle cell anemia and diabetes.
- His manager, Clancy says: he could make a written application for FMLA.
- Terrence doesn't apply but keeps telling Clancy of his absences. Clancy on notice but doesn't follow up with HR.

Is Clancy's employer on notice of an FMLA request?



Also, Can't Hide Behind Policies . . .

Actual knowledge trumps failure to follow policies

- Employee's son made multiple phone calls regarding need for leave. Employer held to have known and assessed liquidated damages.
- Jury: no good basis for termination
- Lost wages and liquidated damages over \$284,000

Boadi v. Center for Human Development, Inc. (D. Mass 2017)

With FMLA (and all leaves) – Remember:

- When you are on notice of an employee's need for leave, remind the employee to use the **proper HR channels**.
- If the employee does not or won't contact the leave team (or tells you everything), **report the information to HR/Employee Leave Management Services team**.
- When meeting with an employee about leave issues, close with: "Is there anything else you want me to know?"
- **You are the fail-safe.**
 - Get the **information to Leave Management** and get written (emailed) **confirmation** from them that they are taking it from there.

The Head Stuck in the Book



Case study: Fred's IBS

- Fred is one of your direct reports
- Suffers from irritable bowel syndrome
 - You know that he will be absent 2 days/mo; 1 day ea.
 - Past three months:
 - 3x/2x/4x
 - Almost all on M or F
 - Recently, he requested a vacation day that was denied, but then called off FMLA on the same day

Is there any problem here?

Patterns of Absenteeism – Your Role

- **You are our eyes and ears** – and the only ones in that position.
- Key in on patterns:
 - Excessive frequency, duration
 - Friday/Monday absences
 - After a denied vacation day
 - Extending holidays
 - Outside activities conflicting with work
- **Go to HR.**

Patterns of Absenteeism – HR's Role

- Once informed, HR will:
 - Gather facts on the concerning conduct – and may need your help in doing so
 - Interview other employees with knowledge
 - Discuss directly with the employee
 - Determine if there is an “honest belief” that the employee is/was engaging in misuse of FMLA
- HR has options for weeding out FMLA abuse – with your help.

The Over-sharer



The Manager Said *What?*

Your manager receives a leave request that may be protected by the FMLA/ADA. In response, your supervisor:

- Sighs. *Cimino v. Magee-Women's Hospital* (W.D. Pa. 2017)
- Says, "You know . . . you've missed a lot of work."
Coleman v. AmeriHealth Caritas (E.D. Pa. 2017)
- Responds that the employee has taken "too many days off."
Troiano v. Cty. of Allegheny (W.D. Pa. 2017)
- Makes comments about the insurance costs related to the leave.
Yeger v. Inst. of Culinary Educ., Inc. (S.D.N.Y. 2017)



The Manager Said *What?*

- Brenda, 15-year employee; needs leave for hysterectomy
- Boss: “Not a good time to take leave,” urges her to read the book titled, *No More Hysterectomies*
- During leave, Brenda learns partner has cancer
- HR calls Brenda: RIF’d b/c client contract lost
 - Termination might be a “blessing in disguise” . . . “would not be able to give 100% to her job anyway”

Drew v. Quest Diagnostics (S.D. Ohio 2012)



You kept your pregnancy from me . . .

Jersey Mike's:

- Pregnant candidate, hired
- Days after she starts, she tells her manager that she's pregnant
- Manager responds with this text:





The Examples Continue . . .

- Sent an email saying “your continued absence compromises our work”
Diamond v. Hospice of Fla. Keys, Inc. (11th Cir. 2017)
- Discloses his condition to his coworkers at a staff meeting. When he returns, his coworkers make obscene gestures about it.
Holtrey v. Collier Cty. Bd. of Cty. Comm'rs (M.D. Fla. 2017)
- Managers emailing each other about having a “back up plan” and needing to terminate employee.
Benz v. Crowley Maritime Corp. (11th Cir. 2018)

Don't be an "Over-Sharer"

- React **calmly and with empathy**.
 - Consider role playing.
 - Keep emotional response in check → **Don't react**.
 - Especially hard when hearing from an under-performing employee.
- Consider a **practiced-standard response**.
 - "UTA and I fully support your ability to take leave when it's necessary.... Please let me know how I can be of help."

Don't be an "Over-Sharer"

- Don't talk to coworkers and subordinates about the details.
- Don't email the employee, or anyone, about the effect the leave will have on their employment.
- Don't reference the leave in the employee's performance review.
- Do: talk to HR in person or on the phone about tricky issues or questions, maybe with an attorney present to preserve confidentiality.
- Do: confirm next steps in writing with HR.

The Badgerer



Work During FMLA Leave

- Joan, manager in Ethics Department
- Requested time off – removal of cyst from her neck
- During two-month FMLA leave, employer required her to perform 20 to 40 hours of work updating compliance cases, revising a safety review project and dropping off files at the office
- Returns to work, resigns
- ***FMLA problem?***

Smith-Schrenk v. Genon Energy Services (S.D. Tex. 2015)



Work During FMLA Leave

- Tammy, Assistant Director at senior living center
- FMLA leave to care for husband after surgery
- Employer called her during leave:
 - Between three and ten times to discuss work-related matters
 - One call discussed hiring of Assistant Residence Director
 - Each of the calls lasted between five and thirty minutes
- Tammy sued, alleging that employer interfered with her FMLA leave by requesting that she work during her leave
- ***FMLA problem?***

Bryant v. Dept. of Aging and Disab. Svcs (5th Cir. 2015)



Work During FMLA Leave

- Joan: Although there is no right under the FMLA “to be left alone” or be allowed to skirt the employer’s “discrete inquiries,” ***asking or requiring an employee to perform work while on leave can constitute interference***
- Tammy: Limited number of calls cannot reasonably be considered as interfering with an employee's FMLA leave. Also, no clearly established law prevented employer from occasionally calling employee while on leave.

Don't be the "Badgerer"

➤ Cannot:

- Condition employment or completing work while on FMLA (or protected) leave
- Coerce or require an employee to work while on FMLA (or protected) leave

➤ Can:

- Contact an employee on FMLA (or protected leave) to request a password to access a file or locate paperwork
- Request an update on where a particular matter was left
- Ask to pass on institutional knowledge

Don't be the "Badgerer"

- **General rule: Leave employees alone.**
- If you must reach out, **contact HR first.**
- **In any communication** about work assignments:
 - Be concise;
 - Don't require a significant amount of time; **and**
 - Don't require the employee to travel to the workplace.
- If the employee agrees to work:
 - It must be **voluntary**: you should communicate that the work is not required;
 - Document any voluntary agreement; and
 - Compensate to avoid wage and hour issues.

The Troublemaker



So Much for Those HR Policies . . .

- Steve, 18-year “top notch [sic]” employee, intermittent leave for a neck injury.
- Denied promotion, bad performance review for absenteeism.
- Steve involved in a dangerous safety incident and admits fault!
- Six managers conclude (conspire?) to fire him.
- Never asked for his side of the story and were inconsistent on treatment of the safety violations of others.
- Steve prevails on FMLA and ADA claims

Smothers v. Solvay Chemicals, Inc., (10th Circuit 2014)



Returning Employee to Work

- Rosana, customer service representative
- Back injury, diagnosed with “quadratus lumborum myofascial pain”
- Took FMLA leave for just over 2 weeks, and upon return, hours reduced to 32 hrs. per week
- Terminated several months later for “inappropriate conduct” because of a difficult relationship with a new direct manager who had assumed the position a month earlier
- Equivalent position: Did employer have legit reason for reducing hours upon Rosana’s return? Jury must decide

Jones v. Aaron’s Inc. (11th Circuit Sept 2018)



Supervisors Violating Policies and Treating Employees Differently

- FMLA claims against HR Director herself, as an individual, allowed because she “played an important role” in and had “sufficient control” over firing.
 - *Graziadio v. Culinary Institute of America* (2d Cir. 2016)
- “Cat’s paw” liability where lower-level supervisor bullied plaintiff regarding her work and her leave.
 - *Marshall v. The Rawlings Co. LLC*, (6th Cir. 2017)
- \$55,000 settlement for providing (not leave) accommodations for other non-disabled employees, or in this case, non-pregnant employees
 - *EEOC v. First Call Ambulance Svc, LLC*, (M.D. Tenn. 2016)

Ensure Your Training Addresses These Six Issues



The Space Case

Know what constitutes an FMLA request. Forward to the right people!



The Lazybones

Don't sit on information. Follow up with administrator.



The Head Stuck In the Book

Be our eyes and ears for FMLA misuse.



The Over-sharer

Control yourself! 😊 Provide script on what to say.



The Badgerer

Don't bother FMLA users. If you must, be cautious and considered.



The Troublemaker

Keep them out of it! Pay extra attention if they're involved.

QUESTIONS???

