

# Employee Relations

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### **No More Half Measures: A Case-Based Approach for Addressing FMLA Abuse**

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*This article recognizes the reality of Family Medical Leave Act abuse and the frustration employers experience when they restrict themselves to the few options for addressing that abuse expressly contained in the FMLA regulations. The cases relied upon in this article serve three important purposes. First, they confirm that employees are abusing FMLA. Second, they identify the lawful options that an employer may take to obtain “line-of-sight” to the employee’s activity while on leave. Third, and finally, they identify a process for preparing for, and then dealing with, FMLA abuse situations.*

This article begins with a problem: employee abuse of leave under the Family Medical Leave Act (FMLA). FMLA abuse, of course, does not refer to employees’ legitimate use of FMLA, but rather to employees using FMLA in a fraudulent and/or sneaky manner, to avoid working when they otherwise could. Simply put, too many employees view FMLA—and especially intermittent FMLA—as a “get out of jail free” card when they do not want to work. As one district court accurately described this mindset, “Plaintiff assumes that because she was approved for intermittent leave, that she could use it whenever she wanted, wherever she happened to be.”<sup>1</sup>

Employers know that employees are abusing FMLA, but struggle to find tools to address the problem. The alternatives set forth in the FMLA regulations offer little more than half measures. When an employee is habitually absent for FMLA solely on Fridays and Mondays, for example, a sure sign of possible FMLA abuse, the regulations offer an employer the option to request recertification.<sup>2</sup> This same option is offered when

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the employee is exceeding the expected duration and/or frequency of FMLA absences indicated by his/her doctor on the most recent medical certification form, or even when the employee plays in a softball game during his third week of a four week FMLA leave.<sup>3</sup> With recertifications, however, the doctor can usually be expected to sign the paperwork, blessing the employee's past absences and perhaps even giving the employee a greater number of anticipated absences in the future.<sup>4</sup>

Fortunately, there are a number of court cases (many within the last five years) that show there is more that employers can do to uncover and address employee FMLA abuse. This article is based on more than 70 such cases. The sheer number of cases—not to mention the blatant FMLA abuse described in many of them—confirms that FMLA abuse is a fact, and not mere speculation.

A discussion of FMLA abuse properly begins with a review of the relevant statutory language and the “honest belief” rule. This article then will provide a “taxonomy” of employee FMLA abuse, identifying and discussing seven categories of this misconduct, with case examples. Finally, this article will examine what all this means for employers who have an FMLA abuse problem.

## **THE FMLA AND THE “HONEST BELIEF” RULE**

The FMLA contains foundational language for an employer to address FMLA abuse. The FMLA provides, for example, that an employee is entitled to FMLA leave only if he/she has a serious health condition “that makes the employee unable to perform the functions of the position of such an employee.”<sup>5</sup> Likewise, the FMLA’s restoration obligation is limited to employees who were on leave “for the intended purpose of the leave.”<sup>6</sup> Finally, the FMLA regulations recognize that an employee “has no greater right to reinstatement... than if the employee had been continually employed during the FMLA leave period.”<sup>7</sup>

These statutory and regulatory reference points work together with something known as the “honest belief” rule<sup>8</sup> to help employers deal with FMLA abuse. This rule originates for all practical purposes in the Seventh Circuit’s decision in *Kariotis v. Navistar Transportation Corp.*<sup>9</sup>

In *Kariotis*, an executive assistant, Kathleen Kariotis, was on FMLA leave following knee replacement surgery. Her return-to-work date was extended several times, and she required two post-operative procedures known as manipulations. The company became suspicious based on a variety of factors, including observations by co-workers and a prior accusation of unethical conduct against Kariotis. The company hired private investigators who videotaped Kariotis on three separate occasions. On each occasion, they saw her walking, driving, sitting, bending and shopping (pushing a grocery cart). They reported that while her stride did not exactly appear even, neither did she appear disabled or physically impaired.

The Human Resources manager, who was the eventual decision-maker in the matter, reviewed this information and set up a meeting with Kariotis, which took place two days after her second manipulation. He did not disclose the videotape. During that meeting, Kariotis said she could do physical things she could not do “before.” The decision-maker understood Kariotis to say that she could not grocery shop or walk straight before her second manipulation. The videotape showed otherwise. The decision-maker then met with others in management and watched the videotape. One of the managers in attendance was asked to be an objective third party. That manager suggested that the decision-maker confront Kariotis’s physician with the videotape and ask if she could do her job. The decision-maker declined, finding that the videotape spoke for itself. He then drafted a termination letter stating that Kariotis was discharged for cause because she had dishonestly claimed disability benefits, and had also been absent from work for more than five days without good reason.

Kariotis filed suit asserting a number of claims, including a claim that the company violated the FMLA when it refused to reinstate her. Kariotis denied acting fraudulently. She also attacked the company’s process on multiple fronts, noting that the company never spoke with her physician concerning the extent of her injury, did not insist on having a second opinion by its doctor, and did not show the videotape to its own physician. The company filed a motion for summary judgment, which the district court granted.

The Seventh Circuit affirmed the entry of summary judgment. Its initial discussion of the honest belief rule appears in its discussion of Kariotis’s discrimination claims. As the court stated, there was no dispute that the company fired Kariotis for disability fraud. From the company’s perspective, the physical activities that it saw on the surveillance videotape equaled and perhaps even exceeded what she was asked to do on the job. In addition, Kariotis had lied (according to the company) when she told the decision-maker that she could not grocery shop or walk before her second knee manipulation. As the Seventh Circuit noted, arguing about the accuracy of the company’s assessment of these points was a “distraction,” as the “question is not whether the employer’s reasons for a decision are *right* but whether the employer’s description of its reasons is *honest*.” While the Seventh Circuit noted that the company’s investigation “hardly looks world class,” Kariotis had failed to meet her burden. With respect to her FMLA claim in particular, the Seventh Circuit noted that the company honestly believed that Kariotis was not using her leave “for the intended purpose” of recovering from knee surgery. The fact that the fraud took place while she was on leave did not change the court’s analysis; otherwise, the court noted, she would enjoy greater rights than similarly-situated employees suspected of fraud who were not on leave.

Not every court has followed the Seventh Circuit’s honest belief rule with exactly the same formulation. The Sixth Circuit, for example, has imposed additional (but achievable) requirements on the employer. The

Sixth Circuit first articulated this standard in *Smith v. Chrysler Corporation*.<sup>10</sup> Under the Sixth Circuit's standard, the employer has to show that its belief was "reasonably grounded on particularized facts" that were before it at the time of the employment decision. If the employer is unable to meet the standard, the honest belief rule does not apply. If the employer is able to meet that standard, the employee has the opportunity to produce proof to the contrary. Under this standard, the Sixth Circuit has noted that it does not require that the decisional process used by the employer "be optimal or leave no stone unturned." Rather, the "key inquiry" is whether the employer made a "reasonably informed and considered decision" before taking an adverse employment action. Thus, this standard is even more focused than the Seventh Circuit's standard on the information that the decision-maker had in front of him/her at the time of the decision.<sup>11</sup>

Numerous courts in the Sixth and Seventh Circuits and elsewhere have followed this honest belief rule in reviewing claims in FMLA abuse situations. This rule has significantly enhanced employers' ability to obtain summary judgment in FMLA abuse cases. The cases recognizing and applying this rule make clear, as the Seventh Circuit did in *Kariotis*,<sup>12</sup> that a plaintiff cannot create an issue of fact merely by disputing the facts of his/her misconduct, the employer's interpretation of the events, or the employer's decision to terminate. Rather, the plaintiff must present proof that the employer's description of its reasons is not honest. Coupled with the fact that the videotaped surveillance present in many of these cases makes it difficult to dispute the underlying misconduct in the first place, this standard of review has led to a very high success rate for employers in FMLA abuse cases.<sup>13</sup>

## **A TAXONOMY OF FMLA ABUSE**

When collected and analyzed as a group, the case law reveals seven basic types of employee FMLA abuse, as follows:

- (1) Working a second job "on the side," in violation of an express written policy prohibiting the employee from doing so;
- (2) Working a second job on the side, where there is no written policy that specifically prohibits it;
- (3) Engaging in manual labor;
- (4) Running errands or shopping;
- (5) Partying or engaging in other social or recreational activities;
- (6) Sneaking off on a pleasure trip;<sup>14</sup> and
- (7) Failing to take care of a family member (if on family-care-related FMLA).

In some cases, of course, the employee's behavior might fall into multiple categories, where, for example, he/she is engaged in manual labor while working a second job.<sup>15</sup>

We will discuss these categories, in order, and provide examples of each. The facts of these examples have been obtained from the courts' decisions. In every one of the examples, the employer prevailed on summary judgment and did not even have to present its case to a jury. These cases help confirm the existence of FMLA abuse and facilitate an understanding of the different forms that it can take. This discussion also helps to highlight a variety of factors at play in these cases, including: the role of policies; the types of suspicions that have caused employers to pursue surveillance or investigate further; the use of surveillance and other lawful means for obtaining information regarding the employee's activities; and the other decisions and processes that a company needs to navigate as it completes its investigation and takes appropriate action.

### **Working on the Side During FMLA in Violation of an Express Policy**

The FMLA regulations recognize that an employer may apply a "no-moonlighting policy" to employees on FMLA leave, as long as it also applies that policy to employees on other leaves of absence.<sup>16</sup> This regulation provides a base of support under the FMLA for employers who propound and enforce these policies.

In *Vail v. Raybestos Products Co.*,<sup>17</sup> for example, the Collective Bargaining Agreement stated that an employee would lose his/her right to employment if he/she "is granted a leave of absence from the company and while on such leave of absence accepts and performs other gainful employment or provides physical labor to operate any type of business enterprise for profit..." Diana Vail, an evening shift factory worker, suffered from migraine headaches. She took more than 35 days of intermittent FMLA leave for that condition in a five month period of time between May and September, typically calling in right before her shift. As the summer progressed and her leave use became more frequent, her supervisors began to suspect that her requests were not entirely legitimate. This suspicion stemmed from the fact that they knew Vail's husband had a lawn mowing business, that summer and fall were the busy season for that business, and that Vail would help him out part-time. They also knew that his customers included several cemeteries which preferred to have grass cut at quiet times during the day throughout the work week, which happened to be when Vail was taking her FMLA leave.

Putting that all of those facts together, Vail's supervisors decided to look further into what she was doing on leave. They engaged the services of an off-duty police officer to monitor her activities. Not long

thereafter, Vail called off of her evening shift. The next morning, around 10:30 a.m., she left her house. The off-duty police officer observed Vail fill up two lawnmowers at a gas station, and take the mowers to a cemetery, where she and another person cut the grass. Later that afternoon, Vail called off for her next shift due to the onset of a migraine. When Vail next reported for work, she was told that she was being terminated. In a meeting, also attended by her union representative, she was told what the police officer had observed, and did not question or challenge the decision at that time.

Vail brought an FMLA lawsuit, claiming that her employer interfered with her FMLA rights when it fired her. While noting that “the use of an off-duty police officer to follow an employee on leave may not be preferred employer behavior,” the Seventh Circuit began its analysis with the company’s honest belief that Vail was not using her leave for the intended purpose. She could not defeat summary judgment under that standard, even with her argument that she was mowing between shifts and therefore not abusing her leave.

There are a number of other “second job” cases involving the violation of a “no-moonlighting” policy while on FMLA leave. In some of those cases, the employer used a private investigator to uncover the secondary employment;<sup>18</sup> in other cases, the employer was able to prove the secondary employment through other means.<sup>19</sup>

### **Working on the Side During FMLA When There is No Written Policy**

The other “second job” cases, of course, take place where there is no express policy that prohibits “moonlighting” while on leave. As the decisions reveal, employers are not defenseless in these situations. Indeed, at least one court has expressly held that an employer is not prohibited from terminating an employee for working in a second job while on FMLA leave by the mere fact that the employer did not have a policy prohibiting that behavior.<sup>20</sup>

In some of these cases, the employee’s secondary employment is inconsistent with a written representation made by the employee or on his/her behalf regarding the employee’s incapacity, thereby justifying termination. In *Lackman v. Recovery Services of New Jersey, Inc.*,<sup>21</sup> for example, Albert Lackman was the director of educational services for a residential drug and alcohol treatment facility. He took FMLA leave and he and his health care provider completed a written form wherein Lackman stated he was “unable to perform work of any kind.” While Lackman was out on FMLA leave, his employer began to suspect that he was working as a real estate agent. The employer hired a private investigator, who confirmed that Lackman was doing so. Lackman was terminated for his conduct. Among other things, the court rejected Lackman’s claim that his employer knew, even before he went out on FMLA, that

he was a part-time real estate agent. The court relied on Lackman's representation that he could not do work "of any kind" to grant summary judgment for the employer.<sup>22</sup>

There are other "second job" cases, typically involving intermittent FMLA leave, where the employee has made a direct choice to favor his side business over the company's business on a particular day, thereby justifying termination. In *Dietrich v. Susquehanna Valley Surgery Center*,<sup>23</sup> for example, Robert Dietrich worked as an operating room technician at a surgery center. He was also a hemophiliac, who took intermittent FMLA leave when he had to miss work for that reason. Dietrich had a side landscaping business, and was working on a patio project for a doctor affiliated with the surgery center. He and his assistant in that business were working on a tight deadline and he called off citing a need for FMLA. A Human Resources administrator knew about the project and the fact that Dietrich had not come to work, and drove by the doctor's house on her lunch break. She observed Dietrich's landscaping truck parked near the house, with Dietrich outside the doctor's house with his shirt off. The surgery center fired Dietrich because he failed to appear at work and was seen conducting his landscaping business instead. Dietrich claimed, without success, that he was not "working" at the doctor's house but merely supervising another employee. The district court granted summary judgment and directly addressed the broader point as to whether an employee can take FMLA leave to engage in a side business, stating:

Any employee ... might reasonably expect the employer to take disciplinary action if he or she is absent from work and found to be instead engaging in some other side business. This is especially true if the employee failed to notify his or her employer of the impending absence, but such behavior can reasonably be seen as dishonest and worthy of discipline even if the excused absence was requested.

As these and other cases suggest, an employee's decision to work a second job while on FMLA,<sup>24</sup> or to take FMLA days to favor a side business,<sup>25</sup> may be cause for termination under the FMLA, regardless of whether there is a "no-moonlighting" policy in place.

### **Employee Engages in Manual Labor During FMLA**

There are a number of cases where the employee has engaged in manual labor while on FMLA. This is a classic type of FMLA abuse, as the manual labor is typically well in excess of the employee's claimed limitations and/or the job duties that he/she claims to be too incapacitated to perform. This manual labor might involve mowing the grass or other similar activity, typically in public view, and easily observed and videotaped.

In *Crouch v. Whirlpool Corp.*,<sup>26</sup> for example, Harold Crouch (and his fiance co-worker) initially signed up to take vacation the first two weeks

of July, but he (not she) was denied that request due to low seniority. He solved that dilemma by applying for FMLA leave, allegedly due to a knee injured doing yard work. His FMLA leave co-incided with the two week period for which he had tried to take vacation. His supervisor noticed, and notified Human Resources. Human Resources discovered that the same thing had happened the prior year, that is, Crouch had been denied vacation, for that same first two weeks of July, and responded by taking FMLA leave for the exact same condition. As a result, the company hired a private detective service. They videotaped Crouch doing 48 minutes of yard work on a day he was out on FMLA leave. The company reviewed the videotape and believed it showed that Crouch had engaged in activities inconsistent with his leave. After Crouch returned to work, he was suspended for falsification, pending investigation. At an investigatory hearing, he disputed his termination but admitted that he had vacationed in Las Vegas during the leave. He was then terminated. The Seventh Circuit affirmed summary judgment in the employer's favor, relying on the honest belief rule.

There are a number of other cases which have found for employers where the employee has engaged in manual labor during FMLA leave.<sup>27</sup>

### **Employee Runs Errands or Goes Shopping While on FMLA**

The *Kariotis* case, discussed above, involved an employee who was videotaped running errands and shopping while out on FMLA leave. There are many other cases where an employee has been observed in similar activities while on FMLA leave. As with manual labor, this is public activity, which can be captured through surveillance. This type of FMLA abuse also presents the potential for employees on leave to run into coworkers.

For employers, the simplest of these errand cases are those where the employer has a "stay-at-home" policy associated with the employee's receipt of paid sick leave benefits. In *Callison v. City of Philadelphia*,<sup>28</sup> for example, David Callison was a maintenance technician. He took FMLA leave for anxiety and stress, and used paid sick leave for that same time. The City of Philadelphia had strict rules for employees on sick leave, including a rule that required an employee "to remain at home except for personal needs related to the reason for being on sick leave." Callison violated this rule and was disciplined. Callison filed an FMLA interference claim, claiming that once an employee is pre-approved for FMLA leave, he should be left alone. The Third Circuit disagreed. The Third Circuit agreed with the district court that the policy did not violate the FMLA because it "neither prevents employees from taking FMLA leave nor discourages employees from taking such leave. It simply ensures that employees do not abuse their leave." The Third Circuit also stated: "[T]here is no right in the FMLA to be 'left alone.' Nothing in

the FMLA prevents employers from ensuring that employee who are on leave from work do not abuse their leave....”<sup>29</sup>

There are other “errands” cases where there was no “stay-at-home” policy. In *Colburn v. Park-Hannifin/Nichols Portland Division*,<sup>30</sup> for example, machine operator Brian Colburn was approved to take intermittent FMLA leave for migraines. He filed an application for short-term disability benefits, stating that he was unable to perform “all activities when an attack occurs, including driving,” but the application was never finalized. The company was suspicious of his FMLA absence for migraines, not only because he failed to submit all of the required medical information needed to process his disability application, but also because he could not be reached at home on days when he called out with an FMLA absence. As a result, the company hired a private investigator to conduct surveillance on back-to-back days, January 28 and 29.

Colburn’s calls-off and his videotaped activities are worth noting in some detail, as they show the value of obtaining this type of “line-of-sight” into an employee’s activities. Colburn was scheduled to work the 2:30 to 11:00 p.m. shift. He called his supervisor around 2:00 p.m. on the 28th, saying he had a severe headache and would not be able to come into work until later. Around 3:00 p.m., he left the house, drove to a gym, spent 30 minutes there in workout clothes, drove to a video store, where he rented a video, and then drove on to three variety stores, emerging from one around 5:00 p.m. with what appeared to be two bottles. Around that same time, Colburn called his supervisor to tell him that his migraines had returned and he would not be into work at all that day. The next day, Colburn left his house around 12:35 p.m., and called in to report off for the day at 2:00 p.m. while running a series of errands, which did not end until 3:30 p.m. The company reviewed the investigator’s report and fired Colburn because his actions were inconsistent with those of someone experiencing an incapacitating migraine.

Colburn filed a lawsuit, asserting claims under the FMLA. Colburn claimed that the activities documented in the video were not inconsistent with his having a migraine which prevented him from working, and that he was most likely experiencing the onset or aftermath of a migraine, which did not prevent him from functioning at the minimal levels shown on the video. The First Circuit found that this position was inconsistent with his prior statement that he was unable to perform “all activities when an attack occurs, including driving” and, without even needing to refer to the honest belief rule, was able to affirm summary judgment for the employer.

*Colburn* reflects the critical role that a private investigator might play in one of these errands cases, giving the employer proof of behavior that would otherwise be concealed. While there are some nuances to take into account,<sup>31</sup> there are a number of additional cases where employers have been able to terminate employees for running errands and/or shopping while on FMLA leave.<sup>32</sup>

## Employee “Parties” While on FMLA

There are several cases where the employee out on FMLA has been observed partying, or otherwise engaged in recreational or social activity, while on FMLA. Assuming that the employee does so outside of their home, this is public activity, which involves some of the same issues associated with errands, with the added risk of greatly upsetting co-workers who are covering for the absent employee.

In *Jaszczyszyn v. Advantage Health Physician Network*,<sup>33</sup> Sara Jaszczyszyn was a customer service representative with back pain. She wanted to take off the week before Labor Day but did not have any vacation time accrued. She took the time, and submitted FMLA paperwork to cover it. While her paperwork reflected a need for intermittent leave, she appears to have treated the FMLA leave as continuous and missed all of September and into October. On October 3rd, she attended Pulaski Days, a local Polish heritage festival. Over a period of at least eight hours, she visited three Polish halls with a group of her friends. One of her companions took and shared pictures with Jaszczyszyn, who posted them on her Facebook page. Jaszczyszyn was Facebook “friends” with several co-workers, who saw the pictures. They felt betrayed that they were having to cover for her only to see her out on Facebook partying, and brought this Facebook activity to her supervisor’s attention. Jaszczyszyn’s supervisor was also one of her Facebook “friends.” She reviewed the photos and forwarded the most upsetting to a Human Resources manager, at his request.

The Human Resources manager met with counsel and developed an investigation plan. Pursuant to that plan, a Human Resources representative set up a meeting with Jaszczyszyn, and did not mention the Facebook pictures in doing so. At the meeting, both the Human Resources manager and representative reviewed Jaszczyszyn’s job requirements, and the injuries that prevented her from fulfilling those requirements, with her. They then revealed the Facebook pictures. Jaszczyszyn was defensive, claiming that no one had told her that she could not attend the festival. When asked to explain the discrepancy between her claim of complete incapacitation and the photos, she claimed that she was in pain at the festival and just not showing it. Jaszczyszyn was terminated at the conclusion of that meeting.

Jaszczyszyn filed an FMLA lawsuit, and the district court granted summary judgment to the employer. On appeal, the Sixth Circuit noted that the employer “rightfully considered workplace FMLA fraud to be a serious issue.” The court affirmed the dismissal of her FMLA retaliation claim on the ground that she had not refuted the employer’s honest belief that her behavior in the photos was inconsistent with her claims of total disability.

There are other cases where an employer has been able to gain information regarding this type of social/recreational behavior, thereby demonstrating FMLA abuse and justifying the employee’s termination.<sup>34</sup>

## Employee Sneaks Off on Pleasure Trip

If errands and partying while on FMLA are high risk behavior while on FMLA—and they certainly are and should be—then sneaking off on a pleasure trip should be actionable FMLA abuse as well.

If there is a “stay-at-home” policy in place, like the one in *Callison* discussed above, an employee who sneaks away on a pleasure trip when on FMLA leave will almost certainly violate it, justifying termination. The policy in *Pellegrino v. CWA*,<sup>35</sup> for example, required all employees on paid sick leave to “remain in the immediate vicinity of their home during the period of such leave.” Denise Pellegrino did not do so during her surgery-related FMLA leave. Rather, about two weeks after her surgery, she snuck off to Cancun, Mexico for a week-long vacation. When she returned from leave, she was asked if she had traveled while on leave, and admitted that she had. She was terminated for violating the employee’s sick leave policy. She claimed (without success) that the policy should not apply to her since it has not been referenced in the “Rights and Responsibilities” documents that she received at the outset of her FMLA leave, and the Third Circuit affirmed the entry of summary judgment in the employer’s favor.

Even in the absence of a “stay-at-home” policy, an employee who sneaks off on a pleasure trip while on FMLA is engaged in high-risk behavior. In *Lineberry v. Richards, et al.*,<sup>36</sup> for example, Carol Lineberry was a registered nurse at a hospital. She sought and obtained FMLA leave for lower back and leg pain. While on FMLA leave, she took a prepaid, planned one-week trip to Mexico. The trip was approved by her doctor. While she was vacationing in Mexico, her activities were well documented on Facebook. This included postings by her various photos, showing her riding in a motorboat, holding two grandchildren while standing, and lying on her side in bed holding up two bottles of beer. Her coworkers complained to her supervisor. Meanwhile, Lineberry complained to her supervisor by email that she had not received a get-well card from her colleagues. Her supervisor responded that they were waiting until she came back from Mexico, and assumed that since she was well enough to travel on a four-hour flight and go through customs, that she would be well enough to come back to work. Lineberry quickly responded by email that sitting on the flight was easier than standing, and that she used a wheelchair at both airports.

Upon her return to work, Lineberry was called into an investigative meeting. The hospital’s director of security investigations was present and reminded her that airports have cameras before showing her the Facebook postings. Lineberry then admitted that she had lied about using a wheelchair. The hospital terminated her for dishonesty and falsification. The court found that her Facebook postings, her lie, and her admission about that lie, were sufficient to meet the Sixth

Circuit's "particularized facts" requirement, and applied the honest belief rule.

There are other cases that involve pleasure trips while on FMLA leave. While several of them raise potential obstacles that companies should consider in certain situations,<sup>37</sup> they are generally very positive for employers.<sup>38</sup>

### **Employee Fails to Take Care of Family Member on FMLA**

The seventh and final category is entirely different than the preceding six. All of the prior categories focus on an employee who is dealing with his or her own medical condition. The fact that the employee is "out-and-about" may therefore be a sign of FMLA abuse. In the case of family leave, however, the focus is on the family member's health condition, and whether the employee is providing care for that family member. Thus, if the family member does not live in the same residence as the employee, the employee may *have* to travel to assist that family member and it is his/her failure to do so that would be the sign of abuse.

In *Scruggs v. Carrier Corp.*,<sup>39</sup> for example, an assembly line worker, Daryl Scruggs, had intermittent FMLA leave to care for his mother in a nursing home. The certification in place at the relevant time permitted Scruggs to take his mother to doctors' appointments once every six months. It did not mention nursing home visits. Scruggs was one of 35 employees at the plant who were suspected of abusing the company's leave policies. The company had hired a private investigator to follow these particular employees. Scruggs called prior to a 6:30 a.m. to 4:30 p.m. shift to report that he was taking FMLA leave for the entire day. An investigator set up video surveillance in front of Scruggs's home from 8:00 a.m. to 4:30 p.m. During that time, the investigator did not see either of Scruggs's vehicles leave the driveway, and saw Scruggs leave his house only once, when he appeared briefly to retrieve mail from his mailbox.

Several weeks later, the investigator provided his report, and video surveillance, regarding Scruggs to the company. Labor relations officials at the plant reviewed the video and did not believe that Scruggs left his home all day. They met with Scruggs to allow him an opportunity to explain his absence. Scruggs stated he could not recall the events of that particular day but he did not abuse his leave and was helping his mother that day. The company suspended Scruggs for misusing FMLA leave, pending investigation. Scruggs then submitted various forms of documentation to support his story, which were all less than conclusive. He also claimed that he had left his house through the back door and returned the same way. The company terminated Scruggs for violating a plant rule regarding falsification. The Seventh Circuit affirmed summary judgment on his FMLA claims under the honest belief rule.

In *Hamm v. Nestle USA, Inc.*,<sup>40</sup> a warehouse employee, Steve Hamm, obtained intermittent FMLA leave for the purpose of providing care to

his father, including personal care, driving, and doctor's appointments. Hamm asked his supervisor if he could take the following day off as a floating holiday. His supervisor denied the request for staffing reasons. Hamm then told his supervisor that he needed to take his father to the doctor and would take FMLA. The supervisor thought this was suspicious and asked Human Resources to find out if Hamm's father had a doctor's appointment the next day. Human Resources called the doctor's office and learned that Hamm's father did *not* have a scheduled appointment. The supervisor then suspended Hamm, pending further investigation, telling him that the company had learned that there was no doctor's appointment, that it suspected him of FMLA misuse, and would investigate.

After Hamm was suspended, the doctor's office called Human Resources back to report that an appointment had just been made. Meanwhile, the supervisor talked to several coworkers, one of whom provided a written statement that Hamm had told him and others in the past that he was taking FMLA to leave work early to go golfing with coworkers. Human Resources also contacted Hamm's father's doctor's office to find out if his appointment history corresponded with any past FMLA days that Hamm had taken in the past six months. The doctor's office responded that they were no longer authorized to provide that information. The company called Hamm in, questioned him, and gave him the opportunity to provide a written statement. The decision-maker reviewed all of the information reported to him, as well as a prior final warning that Hamm had received for suspected dishonesty in the face of a safety violation. He then terminated Hamm for using FMLA to obtain time off from work for non-FMLA purposes. The court applied the honest belief rule and granted summary judgment to the company.

There are other cases that have typically found for employers in family care FMLA abuse cases. These cases suggest that private investigator surveillance can be a particularly useful tool in uncovering this type of abuse.<sup>41</sup>

## **WHAT THESE CASES MEAN FOR EMPLOYERS**

These cases confirm that employers have the ability to investigate FMLA abuse and take action when that investigation reveals abuse. This is apparent not only from the large number of FMLA abuse cases granting or affirming summary judgment, but also by explicit court statements. As stated in *Callison*, an employee's rights under the FMLA do not include the right to be "left alone." *Callison* also stands for the proposition, cited by other courts, that "[n]othing in the FMLA prevents employers from ensuring that employee who are on leave from work do not abuse their leave."<sup>42</sup> It is clear that this right to ensure that employees do not abuse their leaves includes a right for the employer to investigate.<sup>43</sup> Indeed, even a court that denied summary judgment in a particular case

recognized that “[t]he FMLA does not require an employer to ignore human nature and assume that each of its employees always tells the truth.”<sup>44</sup>

These cases reveal that an employer’s ability to take action regarding FMLA abuse is not limited to any one type of FMLA leave. Virtually all types of FMLA leave (with the possible exception of maternity leave) are present among the reported cases. Importantly, this includes intermittent FMLA leave, and the phenomenon noted at the outset of this article, where an employee who has been approved for intermittent FMLA leave believes that he/she can use it whenever they want to do so. Indeed, we see the maddening pattern of last-minute call-ins for single-day intermittent FMLA in many of the examples above, including *Vail*, *Dietrich*, *Colburn*, *Scruggs*, and *Hamm*. In every one of those cases, the employer was able to obtain sufficient evidence of FMLA abuse to take action and terminate the employee.

These FMLA abuse cases also recognize the value of policies, and not just policies that prohibit falsification. *Vail* and other cases illustrate that a policy prohibiting other employment while on leave of any type can lawfully and best prevent that behavior when an employee is on FMLA. As *Callison*, *Pellegrino* and other cases reveal, a “stay-at-home” policy, typically in connection with a paid sick leave, can also help prevent a variety of FMLA abuse, including (but not limited to) errands and pleasure trips while on FMLA. These policies should be reviewed for compliance with other laws, including, but not limited to, state laws prohibiting an employer from taking adverse action against an employee for lawful, off-duty conduct and paid sick leave ordinances. In addition, while *Pellegrino* indicates that employers are not required to do so when the policy derives from an independent sick leave policy, employers should consider including these and any other applicable policies in the “Rights and Responsibilities” paperwork that the employee receives at the outset of an FMLA leave.

These cases also reveal that surveillance, using outside private investigators, is a recognized and legitimate means of addressing FMLA abuse. Statements (like the one in *Vail*) that the use of private investigators may not be “preferred employer behavior” are duly noted. But in case after case, including *Kariotis*, *Vail*, *Colburn*, and others, employers have used private investigators, obtained evidence of FMLA abuse, and lawfully terminated employees based on that evidence. Indeed, of the 71 cases relied upon for this article, 31 of them involved the use of a private investigator. Within the FMLA case law, there is significant support for the use of private investigators (assuming, of course, that they operate within lawful parameters). At least one court has stated that “the practice of hiring investigators, while not entirely desirable, is consistent with Seventh Circuit law.”<sup>45</sup> In addition, courts have rejected arguments that surveillance/videotaping is a *per se* FMLA violation, or is subject to any special conditions under the statute.<sup>46</sup>

These cases not only show that surveillance is lawful under the FMLA, but also make a convincing case for why it can be so effective in dealing with FMLA abuse. As just one example, in *Colburn*, all the employer would have known, without surveillance, was that the employee was calling in before the start of his shift to take intermittent leave for migraines. Because of the surveillance, and only because of the surveillance, the employer was able to piece together and prove that the employee was driving around town, working out at a gym, and running errands for several hours a day *at the same time* he was making those calls and claiming to be too impaired to work. It is no exaggeration to say that the surveillance information in *Colburn* meant the difference between being duped and catching an employee “red-handed.” The information obtained through surveillance in other cases—the grocery shopping in *Kariotis*, the lawn mowing in *Vail* and *Crouch*, and the failure to even visit his mother in *Scruggs*—was similarly powerful evidence (captured in an undisputable fashion on videotape) that the employer never would have had otherwise.

Surveillance is not the only means, of course, by which an employer may lawfully obtain information regarding an employee’s activities while on a leave of absence. As *Jaszczyszyn* and *Lineberry* illustrate, employees sometimes post their activities on Facebook. While employers need to be careful how they obtain such information, these Facebook postings can be valuable and compelling evidence regarding an employees activities while on FMLA leave. In addition, as *Dietrich*, *Hamm*, and other cases illustrate, a human resources official, working carefully with counsel, may be able to obtain valuable information showing FMLA abuse by asking questions, placing an appropriate phone call, or taking other steps.

Finally, the cases help to provide some insight into the types of “suspicious” employee behavior that can and should spark a decision to hire a private investigator, or take other investigatory action, in the first place. The typical employer (and this author) does not believe that *every* employee on FMLA should be subject to surveillance. Rather, there is usually some suspicion of FMLA abuse that causes the employer to take that step. While courts seem to expect some explanation from the employer on this point, it is clear that the employer does not have to meet the same kind of standard that would apply to the termination decision itself.<sup>47</sup>

The most frequent suspicious behavior in our examples was where the employee was unable for whatever reason to take off of work using vacation or a personal day, and handily solved that dilemma by taking FMLA leave instead. This occurred in *Crouch*, *Jaszczyszyn*, and *Hamm*.

Another frequent suspicion that could justifiably kick off surveillance is a pattern of Friday and Monday absences.<sup>48</sup> In *Bratcher v. Subaru of Indiana Automotive, Inc.*,<sup>49</sup> for example, the employer decided to conduct an investigation into the validity of an employee’s

intermittent FMLA leave for migraines. The employer did so based on the pattern of those leaves: Many of the employee's FMLA absences immediately preceded or followed a weekend and, in fact, the employee had missed eight consecutive Fridays due to FMLA leave prior to his termination. This was the primary suspicion that caused the employer to hire a private investigator, who videotaped the employee running errands when he was supposedly incapacitated by migraines. The employer then questioned the employee, who claimed that he had been incapacitated by a migraine that day and was unable to get out of bed until the following afternoon. On this record, the employer had no problem supporting the employee's termination for FMLA abuse. As noted at the outset of this article, this same employer, faced with the employee's pattern of Friday-Monday absences, could have requested recertification. Had the employer done so in *Bratcher*, there is no way that the recertification would have yielded the same result as surveillance.

A third frequent cause for suspicion, justifying surveillance, comes through complaints or tips from coworkers, either directly or anonymously.<sup>50</sup> This point should not be glossed over; this should tell an employer that its employees are rooting for the employer to fix an FMLA abuse problem, and expecting it to do so. There are many other causes for suspicion as well.<sup>51</sup>

These cases and observations set the stage for an employer who is ready to address this problem. Addressing it begins with policy development, as applicable, suspicions in individual cases and then collecting relevant information (through surveillance or otherwise) regarding the employee's activities while on leave. At some point in that process, as in *Jaszczyszyn*, the employer will want to develop an investigation plan, with counsel. That investigation plan will cover a variety of issues, including the pursuit of additional information, if any; whether the employee will be confronted and, if so, how; when in that process the employee might be shown the surveillance videotape; whether the decision-maker will seek any input from others and, if so, who; what should be in front of the decision-maker at the time he/she makes the decision whether to terminate the employee; and what exactly is the decision-maker looking for as he/she makes that decision. All of these investigation plan decisions, as well as the ultimate termination decision, involve both tactical and legal considerations and are best reviewed on a case-by-case basis with counsel.

## CONCLUSION

As noted above, FMLA abuse is a problem that affects not only employers but also every other employee in the workplace. This article outlines the signs and types of abuse, and sets forth an approach—not spelled out in the FMLA regulations—for doing something about it. For

employers with FMLA abuse problems, taking lawful steps in that direction are likely to reap almost immediate dividends.

## NOTES

1. *Crewl v. Port Authority of Allegheny County*, 837 F. Supp. 2d 495 (W.D. Pa. 2011).
2. *See* 29 C.F.R. § 825.308(c)(2).
3. *See* 29 C.F.R. § 825.308(c)(2) & (3).
4. *See, e.g., Crewl, supra* (where employer asked employee to recertify approved FMLA medical conditions, and carefully attached details regarding absences from her doctors and asked if frequency was consistent with health condition; doctors responded that frequency of absences was consistent with medical conditions, thereby approving more FMLA leave).
5. 29 U.S.C. § 2612(a)(1)(D).
6. 29 U.S.C. § 2614(a)(1).
7. 29 C.F.R. § 825.216(a).
8. This rule has also been called the “honest suspicion” rule or defense. We refer to it herein as the honest belief rule, as that is the name that was primarily used in *Kariotis*, and because we use “suspicion” herein for a different purpose: to describe the basis for the employer’s decision to use surveillance or other lawful means to determine an employee’s activities while on FMLA leave.
9. 131 F.3d 672 (7th Cir. 1997).
10. 155 F.3d 799 (6th Cir. 1998).
11. *See, e.g., Abdunour v. Campbell Soup Supply Co.*, 502 F.3d 496 (6th Cir. 2007) (clearly focusing on what the decision-maker “had before him” at the time he made the termination decision).
12. Employers in some cases have benefited by comparing their facts to those present in the *Kariotis* case. *See, e.g., Jenkins v. Ford Motor Co.*, 2008 U.S. Dist. LEXIS 97771 (S.D. Ind. 2008) (observing, in granting summary judgment, that the “factual situation here is much less murky than *Kariotis*”); *Johnson v. Olin Corp.*, 6 Wage & Hour Cas. 2d (BNA) 941 (S.D. Ind. Sept. 29, 2000) (noting that Seventh Circuit acknowledged in *Kariotis* that the “investigation” in that case was “impulsive and arguably came to the wrong conclusion about the plaintiff’s fraud” but affirmed summary judgment “despite [those] defects”).
13. It should be noted that while courts agree that the honest belief rule applies to an FMLA retaliation claim courts differ with respect to whether it applies to an FMLA interference claim. *See Tillman v. Ohio Bell Telephone Co.*, 2013 U.S. App. LEXIS 20723 (6th Cir. Oct. 8, 2013) (unpub.) (listing cases on both sides of that debate). That debate is beyond the scope of this article. Even if the honest belief rule does not apply to an FMLA interference claim, an employer may be able to reduce its risk of such a claim if the employee received all of the FMLA leave to which he/she was entitled. *See, e.g., Seeger v. Cincinnati Bell Telephone Co.*, 681 F.3d 274 (6th Cir. 2012). Legal authority also indicates that the surveillance and/or other evidence that impugns the plaintiff’s leave request may

defeat an interference claim on the grounds that the plaintiff failed to show that he/she was entitled to FMLA leave in the first place. *See Tillman, supra*.

14. The cases on this point typically refer to the employee going on a “vacation.” We use the phrase “pleasure trip” here to avoid any confusion, since employees sometimes take (or are required to take) vacation days concurrently with FMLA.

15. *See, e.g., Johnson, supra*, n.12 (granting summary judgment where box maker was videotaped by private investigator at auto body shop performing a variety of strenuous activities in excess of his restrictions while on FMLA).

16. *See* 29 C.F.R. § 825.216(e) (“If the employer has a uniformly-applied policy governing outside or supplemental employment, such a policy may continue to apply to an employee while on FMLA leave”).

17. 533 F.3d 904 (7th Cir. 2008).

18. *See, e.g., Sepe v. McDonnell Douglas*, 176 F.3d 1113 (8th Cir. 1999) (employee was videotaped worked for family excavation business while on FMLA leave for the birth of his daughter, in violation of Collective Bargaining Agreement which stated: “An employee accepting other employment or engaged in business for himself while on leave of absence shall be discharged”); *Davis v. Subaru of Indiana Automotive Inc.*, 13 Wage & Hour Cas. 2d 1839 (N.D. Ind. 2008) (employee sold auto parts to private investigators during his normal working hours while on one-month FMLA leave, and thereby violated policy that prohibited “gainful employment during a nonoccupational medical leave of absence if such employment occurs during the employee’s normal working hours,” even though employee did not consider his actions to be “gainful employment”); *Stanley v. Volvo Parts North America*, 2008 U.S. Dist. LEXIS 46841 (S.D. Ohio June 17, 2008) (employee, who had intermittent leave for chronic anemia, was observed, through private investigator surveillance, working as exotic dancer, at an establishment called the Boulevard, in violation of company policy prohibiting other employment while on leave).

19. *See, e.g., Pharakhone v. Nissan North America*, 324 F.3d 405 (6th Cir. 2003) (employee worked at family restaurant during FMLA leave after wife gave birth, violating policy prohibiting unauthorized work while on leave; employee gave the restaurant number as the means to contact him); *Edwards v. Sam’s West Inc.*, 18 Wage & Hour Cas. 2d (BNA) 125 (D. Utah 2011) (employee admitted that he continued to engage in part-time self-employment in tax and mortgage field while on FMLA leave, and therefore violated policy that prohibited “employment with another employer and/or starting or furthering a self-employment venture” while on leave); *Fults v. Shiroke North America, Inc.*, 2008 U.S. Dist. LEXIS 33097 (M.D. Tenn. Apr. 22, 2008) (employee violated policy prohibiting employee from “accept[ing] employment or go[ing] into business while on a leave of absence” when she became a 50 percent owner in a barber shop during continuous FMLA leave); *Worster v. Carlson Wagonlit Travel, Inc.*, 353 F. Supp. 2d 257 (D. Conn. 2005) (employee who relocated to Cape Cod and took job in restaurant violated employer policy prohibiting “gainful employment” during FMLA; employer was tipped off by anonymous fax, and then Human Resources confirmed by phone call with restaurant that he was working there); *Germanos v. Columbia University, College of Physicians and Surgeons*, 322 F. Supp. 2d 420 (S.D.N.Y. 2004) (employee worked as part-time Lamaze instructor during FMLA leave for alcohol dependency, in violation of policy prohibiting working for compensation while on paid leave).

20. *See Wesley v. One Price Clothing Stores, Inc.*, 2003 US. Dist. LEXIS 14221 (N.D. Tex. Aug. 15, 2003).

21. 2008 U.S. Dist. LEXIS 11085 (D.N.J. Feb. 13, 2008).
22. For other examples where the employee's secondary employment violated a written representation connected with the leave, *see* *Collias v. Road Commission for Oakland County*, 17 Wage & Hour Cas. 2d (BNA) 48 (E.D. Mich. 2010) (employee with side sealcoating business submitted paperwork that said he was "totally incapacitated" and then was observed wearing white gloves and sweeping or raking a driveway; granting summary judgment despite plaintiff's doctor's testimony that he "checked the wrong box" and did not mean employee could not work at sealcoating business); *Gubanska v. E&E Mfg. Co.*, 2006 U.S. Dist. LEXIS 34433 (E. D. Mich. May 30, 2006) (assembler provided documentation she could not work at employer, and then was seen by private investigator working at family grocery store; granting summary judgment despite employee's claim she was, at most, visiting and socializing with customers).
23. 20 Wage & Hour Cas. 2d (BNA) 364 (M.D. Pa. 2013).
24. *See also* *Jenkins, supra*, n.12 (granting summary judgment where private investigator hired by STD carrier reported that employee on FMLA leave appeared to be working at family metal fabricating company; court rejected plaintiff's claim that she went to facility to sleep on couch, not work, since she did not want to be alone if she had a medical emergency); *Moughari v. Publix Super Markets, Inc.*, 1998 U.S. Dist. LEXIS 8951 (N.D. Fla. April 27, 1998), *aff'd mem.*, 170 F.3d 188 (11th Cir. 1999) (granting summary judgment where employee was using FMLA leave time, for six hours per day, to start up used car business).
25. *See also* *Dalrymple v. George Regional Health System*, 14 Wage & Hour Cas. 2d (BNA) 1336 (S.D. Miss. 2009) (granting summary judgment for employer, when employee rejected weekend work, allegedly to care for terminally ill spouse, but then worked those same days for another hospital).
26. 447 F.3d 984 (7th Cir. 2006).
27. *See* *Tillman, supra*, n.13 (employee on FMLA for back condition videotaped working in yard and garage for two hours one day, and working in his garage another day, when he was repeatedly bending down and lifting pieces of wood trim and carrying them into his house); *Weimer v. Honda of America Mfg., Inc.*, 356 Fed. Appx. 812 (6th Cir. Dec. 14, 2009) (unpub.) (employee on FMLA for head injury built new porch on home, reported by two neighbors and captured on videotape); *Parker v. Verizon Pennsylvania, Inc.*, 309 Fed. Appx. 551 (3d Cir. Feb. 4, 2009) (unpub.) (plaintiff on FMLA for lung conditions observed on construction site of his new home, unloading material from van and coming up from basement where electric saw was being used, perspiring and wiping hands on rag).
28. 430 F.3d 117 (3d Cir. 2005).
29. *See also* *Hackney v. Central Illinois Public Service Co.*, 2006 U.S. Dist. LEXIS 51850 (C. D. Ill. July 27, 2006) (upholding termination of employee observed running errands while on FMLA leave under sick leave policy stating that "[w]ork activity of any kind or recreational activities during a period while on employee is on sick leave is an abuse of sick leave allowance . . . subject to disciplinary action, including discharge").
30. 429 F.3d 325 (1st Cir. 2005).
31. There are two district court "errands" cases that should be noted, as both denied the employer's motion for summary judgment and each contains a passage that might be misunderstood. In *Jennings v. Mid-American Energy Co.*, 282 F. Supp. 2d 954 (S.D. Iowa 2003), the court stated that "[t]he FMLA contains no requirement that an individual on

intermittent leave must immediately return home, shut the blinds, and emerge only when prepared to return to work. Such a rule would be both unreasonable and impossible.” In *Nelson v. Oshkosh Truck Corp.*, 2008 U.S. Dist. LEXIS 72375 (E.D. Wis. Sept. 23, 2008), the court stated, in an effort to distinguish its facts from those in *Vail*, that “[d]riving around town on personal errands for a few hours is significantly different than mowing lawns for a family business.” In *Jennings*, an employee who suffered from rheumatoid arthritis experienced a swollen hand and was sent home near the end of her shift. On her way home, she stopped at Toys-R-Us, and ran into several coworkers. That activity was part of the basis for her termination. In *Nelson*, the employer made the mistake of seeking clarification from an employee’s doctor after it obtained videotape of the employee running errands while on intermittent FMLA leave for migraines, and the doctor used that opportunity to note the “unpredictable” nature of her condition. While these cases serve to remind an employer to review the errands taken against the employee’s duties and/or asserted limitations, there is no reason to believe that either *Jennings* or *Nelson* should be applied to “errands” cases in general, or beyond their unique facts. *See also Hackney, supra*, n.26 (distinguishing *Jennings* because *Jennings* did not apply honest belief rule).

32. *See, e.g.*, *Bratcher v. Subaru of Indiana Automotive, Inc.*, 458 F. Supp. 2d 753 (S. D. Ind. 2006) (granting summary judgment where assembly line worker with intermittent FMLA for migraines was videotaped leaving his home early on Friday afternoon after he had called off, and driving to nearby convenience store); *Mosley v. Park District of Oak Park*, 1998 U.S. Dis. LEXIS 5316 (N.D. Ill. Apr. 14, 1998) (granting summary judgment for employer where private investigator observed plaintiff walking and driving while on FMLA leave following foot surgery); *see also Williams-Grant v. Wisconsin Bell, Inc.*, 2013 U.S. Dist. LEXIS 140657 (E.D. Wis. Sept. 30, 2013) (granting summary judgment where two days of videotaped surveillance of employee on intermittent leave showed her going to and from church on both days and traveling by car to private residence almost two hours away, when she stayed for at least four hours).

33. 504 Fed. Appx. 440 (6th Cir. Nov. 7, 2012) (unpub.).

34. *See also Pulczinski v. Trinity Structural Towers, Inc.*, 691 F.3d 996 (8th Cir. 2012) (affirming summary judgment where multiple coworkers provided statements that employee was declining overtime by using FMLA, and then going to casino); *Seeger, supra*, n.10 (affirming summary judgment where employee on FMLA leave for herniated lumbar disk attended Oktoberfest in downtown Cincinnati for approximately 90 minutes, and was seen by coworkers); *Kitts v. General Tel. North, Inc.*, 2005 U.S. Dist. LEXIS 20421 (S.D. Ohio Sept. 19, 2005) (granting summary judgment where employee attended son’s school function while on intermittent FMLA leave, and then lied about it when confronted); *Connel v. Hallmark Cards, Inc.*, 2002 U.S. Dist. LEXIS 12409 (D. Kan. June 19, 2002) (upholding jury verdict for employer where employee attended county fair while on FMLA; employer believed, based upon information from plaintiff’s doctor’s office, “that if plaintiff was well enough to go to the Fair, then she was well enough to work”); *Agee v. Northwest Airline, Inc.*, 151 F. Supp. 2d 890 (E.D. Mich. 2001) (granting summary judgment where employee would call off on intermittent FMLA for migraines and then go care for his horses at a ranch 45 miles from his house).

35. 478 Fed. Appx. 742 (3d Cir. Apr. 19, 2012) (unpub.).

36. 20 Wage & Hour Cas. 2d (BNA) 359 (E. D. Mich. 2013).

37. There are a few cases that raise the subtle possibility that, depending on the employee’s particular medical condition, the employee might not be able to work and yet still be able to go on a pleasure trip. *See, e.g.*, *Moran v. Redford Union School*

Dist., 15 Wage & Hour Cas. 2d (BNA) 1258 (E.D. Mich. 2009) (noting that there was nothing plainly inconsistent about traveling from Michigan to Florida while suffering from acute situational anxiety, and jury could conclude plaintiff did not engage in activities inconsistent with her leave in doing so; court nevertheless found that plaintiff's obstruction of employer's legitimate request for her medical records supported summary judgment); *Smith v. Southern Illinois Riverboat/Casino Cruise, Inc.*, 2007 U.S. Dist. LEXIS 45094 (S.D. Ill. Jun. 21, 2007) (denying summary judgment based on factual disputes even though Illinois employee admitted she took five-day vacation to Florida during FMLA leave; stating that fact that "she went on vacation does not in itself suggest that her limitations were such that she could work"). It should also be noted that a pleasure trip might need to be evaluated differently if family leave is involved. *See Ballard v. Chicago Park District*, 900 F. Supp. 2d 804 (N.D. Ill. 2012) ("care" for a family member does *not* depend on particular location; therefore denying summary judgment to employer who terminated employee who took an end-of-life trip with her terminally ill mother to Las Vegas under grant by Fairygoddmother Foundation).

38. *See, e.g., Hughes v. City of Bethlehem*, 294 Fed. Appx. 701 (3d Cir. Oct. 2, 2008) (unpub.) (affirming summary judgment where employee called in sick for last two days of Las Vegas vacation, and then lied about it when confronted); *Crouch, supra*, n. 26.

39. 688 F.3d 821 (7th Cir. 2012).

40. 2013 U.S. Dist. LEXIS 115286 (N.D. Ill. Aug. 15, 2013).

41. *See Brown v. Conopco, Inc.*, 2007 U.S. Dist. LEXIS 79933 (D. Md. Oct. 24, 2007) (granting summary judgment where private investigator's report, including report that employee's mother with dementia did not leave her residence, contradicted plaintiff's claim that he was caring for her that day); *Stonum v. U.S. Airways, Inc.*, 83 F. Supp. 2d 894 (S.D. Ohio 1999) (granting summary judgment when employer fired employee for allegedly abusing FMLA leave that she had been granted to care for her elderly mother; two days of surveillance showed plaintiff spent only 12 minutes at her elderly mother's house); *see also Williamson v. Parker Hannifin Corp.*, 208 F. Supp. 2d 1248 (N.D. Ala. 2002) (granting summary judgment where plaintiff took FMLA leave to care for his gravely ill father in Florida; when the employer tried to reach him there, his mother told them plaintiff had gone camping at state park).

42. *See, e.g., Seeger, supra*, n.13; *Hall v. The Ohio Bell Telephone Co.*, 20 Wage & Hour Cas. 2d (BNA) 1540 (6th Cir. 2013) (unpub.); *Parker, supra*, n.27.

43. *See Kitts, supra*, n.34 ("[N]othing in the FMLA prohibits an employer from investigating allegations of dishonesty or from terminating an employee who violates company policies governing dishonesty. The FMLA does not shield an employee from termination simply because the alleged misconduct concerns use of FMLA leave").

44. *Nelson, supra*, n.31.

45. *Davis, supra*, n.18.

46. *See Bratcher, supra*, n.32 (rejecting plaintiff's claims that videotaping employee on intermittent FMLA constitutes interference with FMLA); *Stonum, supra*, n.38 (rejecting plaintiff's claim that defendant was required to seek additional information from her before hiring private investigator).

47. *See Stonum, supra*, n.41 (holding, in Sixth Circuit, that employer must articulate "particularized facts" to support its termination decision, but not its decision to conduct surveillance).

## No More Half Measures

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48. See, e.g., *Tillman, supra*, n.13; *Hall, supra*, n.42 (all finding a pattern of Friday/Monday FMLA absences to be suspicious behavior, justifying surveillance); see also *Williams-Grant, supra*, n.31 (where employee's strategic use of FMLA included using it on Saturdays when that was scheduled work day for her).

49. 458 F. Supp. 2d 753 (S.D. Ind. 2006).

50. See *Weimer, supra*, n.27; *Hughes, supra*, n.38; *Kariotis, supra*, n.9; *Davis, supra*, n.18; *Worster, supra*, n.19; *Stonum, supra*, n.41; *Moughari, supra*, n.24.

51. For a few more examples of suspicious behavior justifying surveillance or further investigation, see *Colburn, supra*, n.30 (employee could not be reached at home); *Vail, supra*, n.17 (employer aware of family's outside business); *Tillman, supra*, n.13 (employee gave advance notice of intermittent FMLA usage).

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