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FMLA LEAVE

Misconduct discovered during FMLA leave justifies termination

by Lisa Berg
Stearns Weaver Miller Weissler Alhadeff & Sitterson, P.A.

In March, the U.S. 11th Circuit Court of Appeals (whose rulings apply to employers in Florida, Alabama, and Georgia) found that Dollar General did not violate the Family and Medical Leave Act (FMLA) or the Americans with Disabilities Act (ADA) when it terminated an employee based on its discovery during her medical leave that she had engaged in misconduct.

An employee who takes leave under the FMLA is generally entitled to be reinstated to her former job, or a substantially equivalent position, upon the expiration of her leave. However, an employee isn't entitled to reinstatement simply because she was on FMLA leave if she wouldn't otherwise be eligible to return to her job. That was the reasoning of the 11th Circuit when it upheld the Dollar General manager's termination.

Facts

Kimberly Thomas, who managed a Dollar General store, took medical leave for breast cancer treatment. While she was on leave, her district manager visited her store in the wake of a robbery and learned that two employees hadn't taken the required computer-based course on robbery prevention, even though their records stated they had completed the training. Dollar General also discovered that Thomas had worked the employees "off the clock" without compensation.

Dollar General terminated Thomas because it had a good-faith belief that she was working associates off the clock and falsifying company records. Thomas denied the accusations but conceded that she had instructed employees to complete the robbery prevention training off the clock, which also was grounds for termination.

Thomas subsequently filed an action against Dolgencorp, LLC, the company that operates Dollar General stores, alleging her former employer discriminated against her based on her disability (cancer) under the ADA when it terminated her employment after she took leave to have a double mastectomy. She also brought claims under the FMLA alleging that Dollar General (1) interfered with her right to take FMLA leave when it refused to reinstate her to her store manager position and instead terminated her after she returned from medical leave and (2) retaliated against her by terminating her employment because she exercised her right to FMLA leave.

Court's ruling

In an unpublished opinion, the 11th Circuit upheld the district court's

decision dismissing Thomas' ADA claim because she failed to demonstrate that the legitimate grounds for her termination asserted by Dollar General were false. The appellate court held that "the only reasonable inference the evidence allows is that Dollar General terminated Thomas because it uncovered evidence that she either falsified company records or worked associates 'off-the-clock.'"

Similarly, the 11th Circuit dismissed Thomas' FMLA interference claim, opining that the district court applied the proper standard when it stated, "If an employer can show that it would have discharged the employee had she not been on FMLA leave, then the employer can deny the employee's right to reinstatement." Her FMLA retaliation claim also failed because she couldn't demonstrate that her use of FMLA leave caused Dollar General to terminate her.

The court rejected Thomas' claim that her district manager's allegedly discriminatory comments that her personal situation had affected her performance and she couldn't "save" Thomas' job raised an inference of causation. The court found the comments were, "at best, stray remarks" insufficient to demonstrate that Dollar General's stated reasons for the termination weren't the real reason.

In addition, the 11th Circuit found the timing of Thomas' firing insufficient for a jury to infer that Dollar General terminated her in retaliation for taking FMLA leave. A short gap of time between protected conduct (FMLA leave) and an adverse action (termination) is generally sufficient circumstantial evidence to establish a claim of retaliation. Here, however, the court held that the "FMLA is not implicated if an employee's absence permits her employer to discover past professional transgressions that then lead to an adverse employment action against the employee."

> **FMLA leave cannot be used as a shield to deflect warranted discipline.**

More specifically, the court found that although Thomas' termination closely followed her leave, the temporal proximity wasn't sufficient to create a genuine issue on the question of causation because her FMLA leave permitted the company to discover her professional misconduct when the district manager visited her store in the wake of a robbery.

Employer takeaway

FMLA leave cannot be used as a shield to deflect warranted discipline. Employers aren't prohibited from disciplining employees on FMLA leave as long as the leave isn't the reason for the discipline. In this case, the company's complete investigation and contemporaneous documentation of the results helped it form the basis of a "good-faith belief" defense.

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EMPLOYER LIABILITY

Florida appeals court expands who can pursue discrimination charges under the FLCRA

by Jeffrey Slanker and Robert Sniffen
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The Florida Civil Rights Act of 1992 (FLCRA), like its federal counterpart, Title VII of the Civil Rights Act of 1964, provides protection from discrimination in employment based on certain protected classes or characteristics, including race, sex, color, and national origin. To move forward with a lawsuit under the FLCRA, a person must first file a charge of discrimination with the Florida Commission on Human Relations (FCHR). Florida's 4th District Court of Appeal (DCA) recently found that a widow may file and pursue charges under the FLCRA on behalf of her deceased husband, who actually suffered the discrimination at issue.

Facts of the case

Michael Cimino, a former employee of American Airlines, was terminated from his job with the airline and committed suicide a short time later. His wife, as his personal representative, attempted to pursue charges that Cimino committed suicide because of his termination, which was unjust and discriminatory in violation of the FLCRA.

The FCHR dismissed the charge filed by Cimino's wife. The commission found that the charge wasn't properly filed because Cimino's wife wasn't a person aggrieved under the FLCRA and she couldn't maintain an action or a charge on behalf of her late husband. She appealed to the 4th DCA.

Court's decision

The 4th DCA reversed the decision of the FCHR and held that Cimino's widow could file a charge of discrimination with the FCHR under the plain meaning of the FLCRA. According to the court, the law permits legal representatives to file charges of discrimination.

The court reasoned that Cimino's wife, as the representative for her late husband and his estate, could maintain a charge of discrimination, and she was therefore permitted to do so in this case. *Cimino v. American Airlines, Inc.*, Case no. 4d1d 2445 (Fla. Dist. 4th DCA, 2016).

Takeaway

Employers across the state should be wary of the implications of this ruling. In reaching its decision, the court surveyed federal law on the matter and found that this theory has generally been dismissed by federal courts for varying reasons. The precedent to allow a much wider class of claimants to pursue charges of discrimination could mean employers may be exposed to potential liability in circumstances they could not have previously envisioned.

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ASK ANDY

Don't forget to check FMLA eligibility

by Andy Rodman
Stearns Weaver Miller Weissler Alhadeff & Sitterson, P.A.

Q *We have an employee who has requested leave under the Family and Medical Leave Act (FMLA), to begin two months from now, to care for her son, who will be having surgery for a serious health condition. The employee currently isn't eligible for FMLA leave because she hasn't worked for our company for 12 months or 1,250 hours. But in two months she will be eligible for leave. When is employee eligibility determined? At the time leave is requested or at the time leave is to begin?*

A A three-pronged test is used to determine employee eligibility for FMLA leave.

(1) **The 12-month service requirement.** An employee must have been employed by the company for at least 12 months *as of the date the FMLA leave is scheduled to begin*. So it doesn't matter that your employee hasn't worked for the requisite 12 months as of the date she requested leave as long as she will have worked for you for 12 months as of the date the leave is scheduled to begin. The same rule applies even if the employee is on approved non-FMLA leave when she makes the FMLA leave request or when the FMLA leave is scheduled to begin.

(2) **The 1,250-hour requirement.** The employee must have worked at least 1,250 hours during the 12-month period *immediately preceding the date the FMLA leave is scheduled to begin*. So it doesn't matter that your employee hasn't worked the requisite 1,250 hours as of the date she requested FMLA leave.

The FMLA incorporates the Fair Labor Standards Act's (FLSA) definition of "hours worked," so only hours *actually worked* count toward the 1,250-hour threshold. For example, vacation, sick leave, and holidays, paid or unpaid, don't count toward the 1,250-hour threshold.

If an employee is on approved non-FMLA leave when she makes the FMLA leave request but she hasn't yet reached the 1,250-hour threshold as of the date of her request and she will remain on non-FMLA leave through the date she wants to begin the FMLA leave (e.g., in two months when she satisfies the 12-month service requirement), then she will not meet the 1,250-hour requirement as of the date she wants to begin the protected leave. She will not have actually worked any additional hours during the intervening two-month period of approved non-FMLA leave.

(3) **The worksite requirement.** The employee must work at a worksite where 50 or more employees are employed by her employer within a 75-mile radius *as of the date she gives notice of her need for leave*. If the test is met on the date she requests leave, then her eligibility will not be affected by a later change in the number of employees within the 75-mile radius. The 75-mile radius is measured by surface miles over public roads.

Employers often overlook the three-pronged test for employee eligibility, instead skipping to inquiries such as whether the employee has a serious health condition. That could be a big mistake, particularly if you grant job-protected FMLA leave to an otherwise ineligible employee. If the employee isn't restored to the same or an equivalent position upon her return from leave, then she may have a claim under the FMLA even though she technically wouldn't have been eligible for FMLA leave at the outset.

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DISCRIMINATION

Adopting policies to prevent gender identity discrimination —first steps for employers

In many large cities and several states, employers are prohibited from discriminating on the basis of gender identity. The New York City Commission on Human Rights recently issued new gender identity enforcement guidance that contains definitions of relevant terms along with examples of employer actions that violate the city's law.

That kind of information can be helpful to all employers that are looking to include gender identity in their antidiscrimination policies. Some employers opt to include sexual orientation and gender identity in their policies even when not required under state law or local ordinance.

Policy benefits

Policies supporting diversity in the workplace go hand in hand with creating equal employment opportunities, and many employers have found benefits from the diverse perspectives and working styles brought to the workplace by employees with different backgrounds and experiences.

Employers may also be interested in adding gender identity to their policies because the Equal Employment Opportunity Commission (EEOC) has taken the position that discrimination on the basis of gender identity is a violation of Title VII of the Civil Rights Act of 1964. Title VII doesn't expressly prohibit gender identity discrimination, but the EEOC asserts that discrimination on the basis of gender identity is unlawful sex discrimination.

So, for employers considering a gender identity policy (and/or looking to include gender identity information in existing policies or harassment prevention training), the following information from the New York City Commission on Human Rights may be helpful.

Definitions

The guidance includes definitions of some basic terms employers can use in policies and training programs.

Gender identity. Gender identity is an internal, deeply held sense of one's gender that may be the same as or different from the sex assigned at birth. One's gender identity may be male, female, neither, or both. Everyone has a gender identity. Gender identity is distinct from sexual orientation.

Gender expression. Gender expression is the representation of gender as expressed through, for example, one's name, choice of pronouns, clothing, haircut, behavior, voice, or body characteristics. Gender expression may not be distinctively male or female and may not conform to traditional gender-based stereotypes assigned to specific gender identities.

Examples of discrimination or harassment

The guidance has several examples of behavior that would violate the city's laws against gender identity discrimination, along with suggestions for best practices for employers. Again, the examples may be helpful when creating policies or updating training programs.

Failing to use an individual's preferred name or pronoun. The guidance points out that some transgender individuals do not use masculine or feminine pronouns (he/she/they) and prefer the gender-neutral pronoun "ze" instead of he or she and "hir" (pronounced "here") instead of him or her. An example of a violation is conditioning the use of a preferred pronoun on an individual obtaining a court-ordered name change—e.g., refusing to call an employee Jane because her work identification says John.

A suggestion for best practices is creating a policy of asking all employees what their preferred pronoun is so no individual is singled out. The guidance also suggests allowing employees to self-identify their name and genders on company systems and providing options other than male and female.

Refusing to allow individuals to use single-sex facilities and programs consistent with their gender. This can be a real point of contention with coworkers, so it will be important for employers to use their policies and training to let all employees know that transgender individuals may use restrooms and locker rooms consistent with their gender, regardless of their assigned sex at birth.

The guidance notes that providing a single-occupancy restroom may resolve employees' privacy concerns, but it is a violation of the law to require a transgender employee to use the single-occupancy restroom.

Bottom line

Employers—and in particular senior management—can have a significant impact on how transgender employees are treated in the workplace. Having a solid antidiscrimination policy in place and reinforcing the policy with regular harassment prevention training will help keep your expectations clear and may help you avoid discrimination claims. ✤

WORKPLACE VIOLENCE

Where would I hide? Preventing workplace violence and employee anxiety

Sadly, workplace shootings have become an all-too-frequent occurrence, with the most recent being a fatal shooting at a Jacksonville landscape company on March 10, 2016. The very real threat of violence in the workplace leads many employees to look at their surroundings and wonder—What would I do? Where would I hide?

Active shooter in the workplace

What do experts say you should do if there is an active shooter in the workplace? Hiding isn't the first. According to most experts, you should do the following three things:

(1) **Evacuate.** If there is an accessible escape path, attempt to evacuate.

(2) **Hide.** If you can't evacuate, hide where the shooter is not likely to find you—ideally, a place that can be locked and that has no window in the door.

(3) **Take action.** As a last resort—and only when your life is in imminent danger—attempt to disrupt and/or incapacitate the shooter.

Employer obligations

Employers have a duty to protect employees from recognized hazards that are causing or are likely to cause death or serious physical harm to employees. The Occupational Safety and Health Administration (OSHA) has issued guidelines on combating workplace violence. These guidelines parallel its voluntary safety program guidelines in that they emphasize the importance of management commitment, employee involvement, worksite analysis, hazard prevention and control, and employee education and training.

For example, OSHA's violence prevention guidelines for healthcare and social service workers recommend:

- Top management involvement in implementing a violence prevention program;
- A written violence prevention program for larger organizations;
- A threat assessment team to evaluate the employer's vulnerability to violence;
- Appropriate engineering controls—for example, enclosing stations and using metal detectors;
- Appropriate administrative work practices—for example, contingency plans to deal with violent customers or coworkers; and
- Staff training on security awareness and how to protect themselves when confronted with threats or violence.

Start with a policy

Another means of addressing the potential for workplace violence and reducing employees' growing concern for their safety is developing or enhancing a violence prevention policy. A workplace violence prevention policy should include these basic elements:

- **Domestic violence and sexual harassment.** A workplace violence policy should provide employees a confidential means to report threats or violence related to domestic violence or sexual harassment. An employee can be reluctant, afraid, or otherwise disinclined to report violent or threatening behavior by a current or former spouse or partner. An employee can be similarly hesitant to report violence or threats connected with sexual harassment, stalking, or other unwanted sexual attention by a supervisor, employee, or nonemployee.
- **Worksite review and analysis.** You should appoint a threat assessment team as OSHA's workplace violence prevention guidelines suggest. OSHA recommends that the team undertake a step-by-step, commonsense review of the workplace to find existing or potential workplace violence risks.
- **Incident reporting.** A violence prevention policy should set out the responsibilities of individuals and departments in implementing the policy. Employees must know to whom they should report suspicious activity, acts of violence, or other safety concerns. You can encourage employees to report violent or threatening situations by ensuring their reports are confidential. Employees might resist reporting threatening behavior if they fear retaliation or becoming a subject of rumors.
- **Employee guidelines and safety plans.** Your HR or security personnel should develop guidelines for employees on handling threats and violent incidents. If warranted, they should work with at-risk employees to develop safety plans that address the specific risks the employees face.

Some of the factors that put employees at risk for violence include exchanging money with the public, working alone or in small numbers, working late at night or early in the morning, working in high-crime areas, guarding valuable property or possessions, and working in community settings. HR and security personnel also should develop plans to protect employees who report they are being harassed, stalked, or threatened.

Use community resources

You should make use of community resources in developing violence prevention programs. Police officers, self-defense experts, judges, psychologists, prosecutors, domestic violence counselors, and victim rights advocates are some of the individuals you can consult for guidance on combating workplace violence.

UNION ACTIVITY

AFL-CIO commits to a "Raising Wages" agenda. AFL-CIO President Richard Trumka issued a statement in February 2016 ahead of the labor organization's winter meeting saying it would not make a presidential endorsement at the meeting but is committed to a "Raising Wages" agenda. The statement said the organization has an endorsement process in place, but "most importantly, we will further elevate the Raising Wages agenda and hold all politicians accountable to it." The statement said the AFL-CIO would "continue to encourage affiliated unions to pursue their own deliberations with their members and come to their own endorsement decisions, if any, through open and rigorous debate."

UAW accuses Volkswagen of wrongdoing. The United Auto Workers (UAW) made claims in a filing with the National Labor Relations Board (NLRB) in February that Volkswagen failed to consult with a newly elected maintenance workers union on a wide range of issues. The union also claimed that a black employee was fired for taking photos to support a claim of workplace discrimination at Volkswagen's plant in Chattanooga, Tennessee, according to news reports. The union claims that Volkswagen is making workplace changes without consultation with the maintenance workers, who voted in December 2015 for union representation. "If Volkswagen maintains this position, more and more charges will accumulate and the company will further damage its relations with employees," UAW Secretary-Treasurer Gary Casteel said. Volkswagen was appealing the decision that allowed a group of approximately 160 workers specializing in the repair and maintenance of machinery and robots to hold a unionization vote without the input of the remaining 1,250 hourly production workers at the plant.

Federal employee union reacts to new federal budget. The American Federation of Government Employees (AFGE) followed the release of President Barack Obama's final budget in February with calls for a 5.3 percent pay raise and paid parental leave for federal workers. "Federal employees have been given the short end of the stick for far too long," AFGE National President J. David Cox Sr. said. The union supports several proposals in the budget, including providing federal employees with six weeks of paid parental leave, the hiring of additional staff at the Office of Personnel Management (OPM) to answer phone calls and e-mails from employees regarding retirement claims, and increasing federal cybersecurity spending by 35 percent to modernize outdated federal computer systems, which could help prevent further attacks such as last year's OPM data breach of federal employees' personal information. ✤

You usually can arrange with the local police department for an officer to speak with employees about crime prevention, security, and handling threats or violent incidents. OSHA also publishes a number of resources on workplace violence at its website, www.osha.gov.

To help meet the critical challenges surrounding workplace violence, check out ***HR Insider: Workplace Violence.*** *This bundle of resources for employers features response plan preparation, employee training, and peer best practices to help mitigate the potentially tragic impact of a violent event. For more information, visit http://store.HRhero.com/hr-insider-workplace-violence.* ✤

WHISTLEBLOWING

Distinguishing the whistleblower from the hard-headed employee

In addition to its obvious mission of policing workplace safety, the Occupational Safety and Health Administration (OSHA) has a lesser-known charge: It investigates and prosecutes whistleblower claims under 22 federal statutes. From regulations over auto manufacturing to financial reform to nuclear energy to clean water and much more, OSHA polices retaliation claims by workers who report violations of federal law.

Whistleblower claims by their very nature present a unique challenge. The people most likely to report wrongdoing are generally not the "go-along, get-along" type. They tend to be outspoken and not too worried about stepping on other people's toes. As a result, it can be difficult to tell the difference between an unnecessarily difficult and insubordinate employee and a legitimate whistleblower. In early February, our federal court of appeals tried its hand at determining the difference.

Grease is the word

The DeKalb County (Georgia) Department of Public Works runs a program aimed at reducing sewer overflows caused by restaurants improperly disposing of fats, oils, and grease. The county requires the nearly 5,000 restaurants located in its borders to have grease traps that collect this type of solid waste. If the traps are missing or fail, fats, oils, and grease accumulate in sewer lines, which may cause them to burst or overflow, releasing raw, untreated sewage that can seep into surrounding water.

Daisy Abdur-Rahman and Ryan Petty were compliance inspectors for the program. Compliance inspectors monitor grease traps, process and respond to complaints, and investigate discharges. The department also assigned Abdur-Rahman and Petty to a committee charged with updating county ordinances and procedures regulating restaurants' solid-waste disposal.

For the first six months after the county hired them in mid-2004, Abdur-Rahman and Petty were probationary employees who could be fired at will. Their immediate supervisor was Chester Gudewicz, the county's compliance section supervisor. He in turn reported to John Walker. Unfortunately, the probationary period was marked by conflict between Gudewicz and Abdur-Rahman and Petty.

The problems began when Abdur-Rahman and Petty asked Gudewicz for historical records of sewage spills in the county. They wanted the records for their committee and compliance work so they could identify "hot spots" where sewers had frequently overflowed and use the information to facilitate future enforcement. When Gudewicz failed to produce the records, they persisted, asking for the information on a weekly basis.

By late 2004, Gudewicz was actively discouraging the search, telling Abdur-Rahman and Petty that they were "ruffling too many feathers" and "rocking the boat." He became increasingly frustrated and impatient with them and their questions. He viewed their inquiries as "insubordination" and would walk away to avoid them. Walker also resisted Abdur-Rahman and Petty's efforts to find the records, telling them that they didn't need the data and that they were being "too thorough or scientific."

The managers' opposition to the requests led Abdur-Rahman and Petty to suspect that the county had something to hide. They told coworkers and supervisors that "the county could get in trouble" with the state of Georgia for failing to properly document and report spills. They also came to believe that Gudewicz was unqualified for his position and was more concerned about preserving the status quo and his job than running the program.

Abdur-Rahman and Petty raised their concerns about the county's lack of compliance and enforcement with increasing frequency. Tensions spiked in January 2005, when, according to Gudewicz, he overheard Abdur-Rahman call him "incompetent" and "a liar."

The employees' suspicions turned out to be unfounded. The records they sought were available in a nearby office, and the county was investigated by the Georgia Environmental Protection Division, which concluded it had reported spills as required by state law.

In the meantime, however, Gudewicz concluded that Abdur-Rahman and Petty's behavior was disruptive and harmful to workplace morale. In January 2005, he sent Walker two memoranda, one recommending that Petty be fired and the other reporting Abdur-Rahman for "argumentative" behavior. The county fired both employees in early March 2005.

Supervisory ineptitude isn't retaliation

One month later, Abdur-Rahman and Petty each filed complaints with OSHA asserting that the county had fired them in retaliation for voicing their concerns under the Federal Water Pollution Control Act (FWPCA). After a three-week trial, an OSHA judge concluded that they had in fact "blown the whistle" by pressing for the records and voicing concerns about the county's regulatory compliance and enforcement after they were met with resistance.

However, the OSHA judge also concluded that the county showed that it would have terminated Abdur-Rahman and Petty "even had they not engaged in protected activity because

AGENCY ACTION

DOL announces 2017 department budget. U.S. Labor Secretary Thomas E. Perez in February 2016 released the Obama administration's 2017 U.S. Department of Labor (DOL) budget, which includes $12.8 billion in discretionary funding, along with new, dedicated mandatory funds. Job creation and training are among the programs emphasized in the budget. Among the budget's other highlights are more than $2 billion for a Paid-Leave Partnership Initiative to assist up to five states in launching paid leave programs, a cost-neutral suite of reforms to the unemployment insurance program, $595 million for the Occupational Safety and Health Administration (OSHA), $397 million for the Mine Safety and Health Administration, and $277 million for the DOL's Wage and Hour Division (WHD). In particular, the DOL said, the budget supports WHD efforts to thwart illegal misclassification of employees as independent contractors.

EEOC statistics show 2015 enforcement, litigation data. The Equal Employment Opportunity Commission (EEOC) has released breakdowns of the 89,385 charges of workplace discrimination the agency received in fiscal year (FY) 2015. Retaliation charges increased by nearly 5% and continue to be the top category of charges, accounting for 44.5% of all charges filed. Race claims were the second most common charge, accounting for 34.7% of all charges. Disability discrimination charges increased by 6% from last year and were the third most common charge, accounting for 30.2% of all charges filed. The EEOC resolved 92,641 charges in FY 2015 and secured more than $525 million for workers claiming discrimination in private-sector and state and local government workplaces through voluntary resolutions and litigation.

Agencies publish new hazard alert after series of deaths. A new hazard alert from OSHA and the National Institute for Occupational Safety and Health (NIOSH) identifies health and safety risks to oil and gas industry workers who manually gauge or sample fluids on tanks. OSHA said a series of preventable deaths related to manual gauging of tanks triggered the alert. The alert provides specific recommendations designed to protect workers from hazards associated with opening tank hatches to manually gauge or sample hydrocarbon levels. The recommendations fall into three main categories: engineering controls, work practices, and personal protective equipment. The alert highlights OSHA and NIOSH research showing that workers may be exposed to very high concentrations of hydrocarbon gases and vapors when manually gauging or sampling production tanks. Workers also face the risk of fires or explosions. ✤

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managing them was above their supervisor's means and they did not fit the peculiar culture of their workplace." The employees appealed.

Employer must untangle the reasons

Ultimately, the 11th Circuit agreed that Abdur-Rahman and Petty had engaged in protected conduct. They repeatedly sought the county's historical records of sewage spills, believing the records would be helpful in their enforcement and compliance work. Their requests were rebuffed, however, and they were discouraged from pursuing the information.

Abdur-Rahman and Petty "came to suspect the county might be hiding the information." They told coworkers and supervisors that "the county could get in trouble" with the state, and Abdur-Rahman confronted Gudewicz about why hot spots continued to exist. Although their suspicions turned out to be unfounded, they had a good-faith basis for voicing them.

The court of appeals disagreed with the OSHA judge's conclusion that the county would have fired Abdur-Rahman and Petty anyway. The court accepted the argument that Gudewicz's poor management and supervisory skills were a factor in his decision to recommend firing them. However, the county wasn't able to separate the retaliatory motives for the terminations from the nonretaliatory reasons.

Given the intertwined nature of its legitimate and retaliatory reasons, the county didn't meet its burden of showing that it would have made the same decision absent the employees' protected activity. *DeKalb County v. U.S. Department of Labor* (11th Cir., 2016).

Manage the work, not the personality

It's often the very nature of whistleblowers to be difficult employees. That's why they're willing to stand up when others keep their heads down. But that doesn't mean you can't manage employees with whistleblower tendencies, requiring them to behave appropriately and work cooperatively and disciplining them when they don't.

The key is to avoid conclusory labels that look like codes for "troublemaker" (e.g., difficult or argumentative) and focus on the work-related results of a whistleblower's behavior (e.g., failing to follow legitimate directions and interfering with the work of others). ✤

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