

**REASON MORE IMPORTANT THAN TIMING
WHEN REFUSING TO REINSTATE AFTER FMLA LEAVE**

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In *Phelan v. City of Chicago*, 347 F.3d 679 (7th Cir. 2003), the U.S. Court of Appeals for the Seventh Circuit (Indiana, Illinois, Wisconsin) reminds employers that there are situations in which an employer may lawfully terminate an employee, even while the employee is on Family and Medical Leave Act ("FMLA") leave.

The FMLA provides eligible employees with up to 12 weeks of unpaid, job-protected leave during a designated 12-month period when they are not able to work because of, among other reasons, a serious health condition. In most cases, an employee will be reinstated to the position the employee held prior to taking FMLA leave, or to an equivalent position. However, an employee's right to reinstatement is not absolute. The FMLA does not entitle an employee to any right, benefit or position of employment that the employee would not have been entitled to had the employee not taken leave.

According to the *Phelan* case, Phelan was employed in two separate positions by the City of Chicago, first as a police officer, and then as a ward superintendent for the City's Department of Streets and Sanitation. In July 1997, Phelan took leave because of personal health problems. In September 1997 (after using up all of his sick days) he applied for and was granted FMLA leave.

In September 1997 Phelan was indicted for mail fraud. The City asked him to resign. When he refused, the City fired him. His termination was processed the same day that he officially returned from FMLA leave. Phelan requested reinstatement, and the City notified him that he no longer had employment. Phelan then filed suit alleging, among other claims, a violation of the FMLA.

Phelan conceded that he was terminated because of the poor quality of his work. Allegations of his poor work performance included reports made by superiors that Phelan was not managing his assigned ward correctly, was unable to work effectively with others, "simply wasn't getting the job done", relied too heavily on subordinates, was difficult to reach via radio or pager, and refused to drive the city van during working hours.

Phelan admitted he demonstrated poor performance prior to his FMLA leave, and he admitted that he was terminated because of his poor performance and because the City found his temporary replacement (the person who replaced him during his FMLA leave) to be much more satisfactory. His FMLA claim was based on the timing of the termination decision. He claimed that it was unlawful to make the decision to terminate him for poor performance while he was on FMLA leave.

The court of appeals upheld the district court's decision to dismiss Phelan's FMLA claim. In reaching its decision, the court of appeals determined that the City's preference for the replacement employee did not alone demonstrate that Phelan would not have been fired for poor performance. The court of appeals followed the reasoning of an earlier case in which it noted that, even if it is possible that an employer would have disciplined an employee less severely (something other than termination) if there had not been another individual ready to

take the employee's place, the court would not tell employers how to discipline employees (provided the chosen discipline is not unlawfully discriminatory).

It is important to note that the *Phelan* case does not stand for the proposition that an employer always has the right to terminate an employee who takes FMLA leave simply because the employer prefers the replacement. One key inquiry will relate to whether any such preference was related to the employee's taking of FMLA leave. *Phelan* merely confirms that, if an employee would have been terminated regardless of his or her use of FMLA leave, a preference for a replacement employee should not prohibit the employer from following through with the termination.

Employers should continue to use caution when terminating an employee during or shortly upon return from FMLA leave and make sure that the reason for the termination is not the employee's use of FMLA leave. Although it is clear that the reason for refusing to reinstate an employee upon return from FMLA leave (or for terminating an employee during or shortly after return from FMLA leave) is critical, *Phelan* and related cases confirm that timing remains an important factor in supporting (or contradicting) an employer's stated reason. For example, following through on a decision to terminate for a legitimate, non-discriminatory reason that is made prior to the time an employee takes FMLA leave, or making a decision to terminate based on information obtained during the time that an employee is on FMLA leave, may be easier to defend than terminating an employee during FMLA leave for reasons that were known to the employer well before the employee took FMLA leave.

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