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## FMLA Leave Employee Termination for Unprotected Absences Upheld

Requests for intermittent FMLA leave to cover partial days or periodic bunched days is growing. Employers should develop policies adaptive to such requests and require renewal notice by employees seeking such leave periodically so that they do not waive the request for FMLA-leave notice requirement. Employers also should have strong “excessive absenteeism” policies.

A recent Federal Appeals Court ruling in the Seventh Circuit (covering the states of Illinois, Indiana and Wisconsin) examined the interplay between

protected (FMLA) and unprotected excessive absenteeism.

Julie Long worked as a payroll clerk for her employer for more than 20 years, and generally had received favorable performance reviews. But in June 2005, she was absent approximately 25 percent of her scheduled workdays, and 40 percent in July. She also was making numerous mistakes and was late in completing her work assignments. She received three oral warnings but the problems persisted. Over time, the errors in her work and increasing absences led to poorer

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reviews, and in 2005, a withdrawal of a promotion recommendation due to her absenteeism. Meetings were held with supervision and the employee about this lingering situation.

In September 2005, a manager informed Long that she might be eligible for FMLA leave. Long then applied for intermittent FMLA leave under the FMLA for tennis elbow and later for an additional medical condition. The employer approved her request for FMLA leave in October and instructed Long to notify her supervisor when she would be absent because of her medical condition. She then informed her employer that six absent days in October, eight days in November and one day in January 2006 were designated as FMLA leave. She also was absent nine days in December and five days in January. The case record indicated those absences were not FMLA-related or protected.

When the absences and performance problems continued a manager who didn't know about her FMLA leave made the decision to terminate her.

Long filed suit, claiming retaliation for taking FMLA-protected leave. The Federal Appeals Court sided with the employer, stating that Long's performance deficiencies were documented before she took leave, the termination decision-maker didn't know of her FMLA leave, and she had numerous absences that were unprotected, allowing her no greater right to continued employment.

Maybe this case is a reflection of the concept: "Look, we need her here and working. She can't do her job if she's not here." Put another way: Employees taking intermittent FMLA leave are not protected from termination if documented poor performance and unprotected absences would otherwise justify termination.

### Three Queries on the Facts

Would the result have been different if:

- The manager who terminated the

employee had known about her FMLA leave and excused absences?

- The ex-employee had sought to cover all of her absences in November through January as FMLA-related?

- The employer had not specifically

instructed the employee to notify her supervisor when she would be absent because of her medical conditions?

*Julie S. Long v. Teachers Retirement System of the State of Illinois*, No. 0803094 (7th Cir., Oct. 23, 2009) **MF**