

FIRING AN EMPLOYEE ON FMLA LEAVE ISN'T ALWAYS UNLAWFUL

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Terminating an employee out on Family and Medical Leave Act leave is risky business. After all, the major tenet behind the FMLA is to permit employees to take job-protected time off when serious health or family concerns arise.

But does that mean that an employer may never terminate an employee out on leave? No, but you better have well-supported business reasons for your termination decision, and be prepared to defend your decision in court. A recent decision by the Tenth Circuit offers a useful look at how a Colorado employer did it right and avoided liability for an FMLA interference lawsuit.

12-Year Employee Struggles After Promotion

Hired in 2002, Kris Olson began working for [Penske Logistics LLC](#) as a dispatcher. Over the next 10 years, he was promoted three times, including his 2013 promotion to operations manager of Penske's Denver warehouse. In that role, Olson supervised over 30 employees and was responsible for hiring, financial records, moving and tracking inventory, conducting regular inventory audits, and other managerial tasks.

In his first year as operations manager, Olson appeared to be performing adequately, but not exceptionally, scoring mostly "2" and "3" grades on a five-point scale on his 2013 performance review. He was told he needed to continue to train in his position. In January 2014, however, Penske issued a written warning to Olson for failing to fire an employee who had violated safety rules.

Olson was told that any future failure to follow procedures would result in more severe discipline, up to and including termination. In June (about five months later), Olson's supervisor, Rick Elliott, put Olson on a 60-day "action plan" that instructed Olson to hire more workers, process inventory more quickly, and respond promptly to phone calls and emails. The "action plan" concluded with a warning that failure to meet all requirements would result in Olson's immediate termination. Olson appeared to follow the instructions in his "action plan."

On July 9, 2014, Olson requested FMLA leave, which was approved. Olson's last day at the warehouse before going out on leave was Friday, July 18, 2014.

Employer Discovers Employee's Misconduct

July 18 proved to be a pivotal day for Olson. On that day, Elliott received a monthly grade that primary client, [Whirlpool](#), gave the warehouse for June — a "D." With Olson out on leave, Elliott asked a supervisor at another Penske warehouse, Nicki Brurs, to come to Denver to investigate why Whirlpool rated the Denver warehouse so low. Brurs found that there were at least 152 discrepancies between the warehouse's inventory records and its actual inventory. In addition, Brurs learned that the warehouse was 567

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audits behind schedule, having done only 37 random audits over the preceding few months.

At that same time, Elliott also discovered that over the previous few months, Olson had not billed Whirlpool for extra work performed by the warehouse. Earlier, Elliott had asked Olson why he had not billed Whirlpool for extra work and Olson answered that there had not been any extra work for which to bill. On July 28, however, Elliott learned that there had been several instances of extra work for Whirlpool, meaning Olson had lied to him.

By Aug. 1, Elliott had made up his mind that Olson had to go. He sent a report to human resources summarizing the problems he had discovered with Olson, including his dishonesty. He detailed that Olson had hidden inventory losses by creating records for an imaginary storage location — a “ghost stow” — that allowed Olson to hide inventory losses for four years. He also reported that Olson had instructed his staff not to tell Whirlpool when inventory was missing, but instead, to report the missing units as damages. Elliott told HR that he wanted to bring in a temporary replacement as operations manager while Olson was out on FMLA leave and fire Olson on his first day back to work. HR agreed that Olson should be fired.

Despite its decision, Penske continued its investigation into Olson’s misconduct. Over the next couple of weeks, Penske discovered additional inventory errors and “ghost stows,” resulting in more than \$120,000 of errors in the warehouse’s records. It also concluded that Olson had failed to train his employees, failed to enforce attendance policies, failed to return damaged items and other lesser performance issues.

Terminated, Despite Being On Leave

On Aug. 18, 2014, Penske sent Olson a termination letter. Initially Penske thought that Olson’s leave had not been approved and stated: “Due to the unapproved status of our leave of absence, coupled with a level of unsatisfactory job performance that cannot be tolerated, your employment with Penske is being terminated effective immediately.” After Olson informed them that his leave had indeed been approved, Penske sent a second termination letter, indicating that he would continue on unpaid leave until his FMLA was exhausted on Oct. 19, 2014, at which time his employment would be terminated. Penske did not inform Olson about the warehouse’s inventory problems or give him a chance to defend himself, but instead referred to severe performance issues and policy violations.

Olson sued Penske alleging that his employer had unlawfully interfered with his FMLA rights.

Well-Supported Termination Decision Saves The Day

The Tenth Circuit agreed with the Colorado district court in granting summary judgment to Penske, finding that Olson failed to offer evidence that there was a causal connection between his taking FMLA leave and his termination. *Olson v. Penske Logistics Inc.*, No. 15-1380 (10th Cir. Aug. 26, 2016). Key to avoiding liability was Penske’s evidence supporting its reasons for terminating Olson, showing that Olson was not terminated because of his leave but rather because of his many instances of unsatisfactory performance.

Olson argued the timing of his termination, and had he not been on leave, he might have been able to defend the inventory problems and save his job, as reasons to establish the requisite causal connection. He also alleged that Elliott resented Olson “missing too much work” while on leave, resulting in Elliott and Brurs having to travel to Denver in his absence. The court rejected Olson’s claims, finding he offered no facts to support his statements, only speculation. Unsupported speculation was insufficient for the court to send Olson’s lawsuit to a jury.

Avoiding FMLA Liability

The court stressed that Penske had provided substantial, unchallenged evidence that Olson’s poor performance led to his termination. It stated:

“The record shows step by step how his misconduct was discovered, how Penske’s employees reacted to it, and why they ultimately decided to fire him. There are no holes, no conflicting statements, simply nothing that indicated inaccuracies in Penske’s story. No evidence suggests that Olson could possibly have kept his job once his misconduct was discovered, and two affiants insisted the opposite is true — they are ‘not aware of any employee who has been found to have the same level of unsatisfactory performance as Olson but who were not discharged.’”

By conducting a thorough investigation into Olson’s misconduct, making sure everyone was on the same page regarding the reasons for terminating Olson, documenting each step, and treating Olson no worse than others who engaged in similar misconduct, Penske was able to avoid liability for an FMLA claim, even when terminating Olson while he was out on an approved FMLA leave. These steps are a good road map to follow whenever discipline or termination issues involve an employee on, or recently returned from, FMLA leave. Still, keep in mind that despite the mountain of evidence here, Penske was forced to defend its actions in the district court and on appeal.

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