

# No Blank Space In Case Law On Handling FMLA Abuse

By **Daniel Schwartz** (May 24, 2023)

Just like you can't spell awesome without "me," you can't take Family and Medical Leave Act leave without some conditions. Employers and employees alike should know all too well that one of those conditions is that the FMLA leave should be genuine. FMLA abuse can lead to bad blood between the employer and the employee.

This is me trying to incorporate some lyrical Easter eggs while sharing some insights on how to handle FMLA leave issues.

Here's a hypothetical: You are one of the many hundreds of thousands of people attending one of Taylor Swift's Eras Tour shows this spring and summer. At the concert, you bump into an employee. But it just so happens that the employee has been out on FMLA leave for a serious health condition.



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Can you penalize them for abusing their leave?

The answer isn't quite as delicate as you might think. This type of scenario is not a blank space in our judicial system.

In the legal world, there are a few instances of employees either going to a concert or performing in one while on FMLA leave.

Take, for example, the U.S. District Court for the Eastern District of Pennsylvania's 2019 ruling in *Beishl v. County of Bucks*.<sup>[1]</sup> In that case, an employee was thought to be performing with his band — which, not ironically, was named *Flabbergasted* — and calling out of work, sometimes on intermittent FMLA leave.

The employer got word of one such concert and videotaped the employee. That subsequently led to discipline where the employer believed that the employee was abusing FMLA leave, with a written notice stating there were "repeated callouts following a two or three day pattern around weekends and also occurring on the same dates as concerts for which the employee was performing with his band."

The district court found that the employer had an honest belief that "an individual who was capable of screaming rock lyrics into a microphone in a bar until the small hours of the morning was capable of coming to work that day or the day before."

In other words, the employer didn't have to tolerate it. And thus, the employer terminated the employee properly for FMLA abuse — not because it was retaliating against him for taking leave in the first place.

The U.S. District Court for the Northern District of Texas' 2017 ruling in *Jackson v. BNSF Railways* serves as another example.<sup>[2]</sup> In that case, an employee allegedly attended a Beyoncé concert in a luxury suite while out on FMLA leave, and only took the leave shortly after receiving a performance improvement plan.

Should the employee have said no to the concert? Soon enough, the employer terminated her employment, finding that she had abused her medical leave. The district court agreed,

concluding that the employee could not show that the employer's actions in terminating her employment was a pretext for terminating her because of the leave itself.

So, can an employer fearlessly terminate an employee if they are seen at a concert while on FMLA leave? Not quite. There are a few things you'll want to consider before making a decision.

### **Begin again.**

Before jumping to conclusions, start clean with a look at all the facts. Conducting surveillance brings its own legal exposure, so talk with others who may have interacted with the employee. Go in with eyes open to the entirety of the situation.

### **Ask questions.**

Once you have the facts, rather than just reacting, reach out to the employee and ask them pointed questions and give them an opportunity to respond.

Not all serious health conditions and FMLA leave require an employee to be confined to a hospital bed. Of course, if they were seen dancing with alcoholic drinks in hand, that might require some additional questions. And who knows, maybe the employee will admit that they did something bad.

### **Formulate an end game.**

Once you have the facts straight and have talked to the employee, make sure that the employee's actions really were inconsistent with the leave. But if that's the case, then decide on the discipline, up to and including termination of employment with documentation to support the decision.

It's hard for an employee to say they are innocent, if you've got the evidence to back it up. You can then tell the employee it's time to go.

Once you take these steps, you may not be completely out of the woods, but they are a good starting point.

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[1] *Beishl v. Cty. of Bucks*, 2019 U.S. Dist. LEXIS 158549.

[2] *Jackson v. BNSF Ry. Co.*, 2017 U.S. Dist. LEXIS 118587.