

# Recent Appellate Court Decision Provides Guidance For Investigating Intermittent FMLA Abuse

## Labor & Employment Law Update

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Intermittent FMLA leave can be a source of frustration for employers even when it is used appropriately because it complicates staffing and planning and interrupts business operations. But when an employee's use of intermittent leave seems just too convenient (e.g., when it is regularly used on Fridays and Mondays to make long weekends), employers naturally grow suspicious.

The recent *Sharif v. United Airlines, Inc.*, decision from the U.S. Court of Appeals for the Fourth Circuit confirms that if an employer is able to prove intermittent FMLA abuse by conducting a prompt and thorough internal investigation, and perhaps some luck, it is justified in taking action against an FMLA abuser.

Sharif arranged his schedule so that he was required to work only one shift – March 30 — during a three-week period. Having arranged that schedule, Sharif took a vacation to South Africa. At approximately 1 a.m. on March 30th, Sharif left a voicemail saying he needed to take intermittent FMLA leave for his shift that day.

Sharif's use of intermittent FMLA leave in the midst of a lengthy vacation struck United as unusual as did the fact that Sharif's wife (also a United employee) was taking similarly-scheduled time-off. Furthermore, Sharif had taken FMLA under similarly suspicious circumstances in 2013. United investigated Sharif's whereabouts and learned, among other things, there were no flights from South Africa at that time would have allowed him to return to the U.S. in time for his shift. When United questioned Sharif, his story shifted multiple times suggesting he was being dishonest. Ultimately, United concluded Sharif never intended to work his March 30th shift and terminated him.

Sharif sued alleging he was terminated in retaliation for taking FMLA leave. United responded that Sharif's use of FMLA leave on March 30th was fraudulent. United prevailed in the district court without a trial, and the appellate court upheld the judgment because United made "a reasonably informed and considered decision" before terminating Sharif.

United's investigation uncovered facts—and an equivocating employee—that made the case for termination a much easier decision than most employers typically face. Nevertheless, employers can still learn lessons from the thoroughness of United's investigation. When faced with suspected FMLA abuse, employers should conduct as much of the investigation as possible before interviewing the employee. When it is time to interview the employee, employers must carefully document the answers the employee provides. If the employee is a habitual FMLA abuser, careful documentation of prior explanations for FMLA use may, over time, reveal inconsistencies and untruths that are helpful in the future.

The bottom line is that FMLA abuse is usually difficult to establish. Employers should consult with experienced labor and employment counsel before, during, and after any investigation of suspected abuse to ensure that whatever decision is made is supported by strong evidence that can withstand court scrutiny.

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