

When Can You Terminate an Employee with a Medical Condition?

As an employer, it comes as no surprise to you that federal and state laws may limit your ability to make certain employment decisions. Sometimes, these limitations may expose you to liability without your even knowing it. A recent case provides an unfortunate example.

Imagine that the performance of one of your better employees has begun to fall below company standards. Poor work performance can have several causes – a new and unfamiliar directive from management, job unhappiness, personal issues, laziness – but this employee's work habits have always been well above par. You ask him about it, and he surprises you by telling you that he's suffering from a medical condition.

At this point, the careful employer begins to think about the implications of two federal laws – the Americans with Disabilities Act (ADA) and Family Medical Leave Act (FMLA). Each law requires different things of employers. The case of *Spurling v. C&M Fine Pack, Inc.*¹ provides a good synopsis of what federal law requires you to do once you know one of your employees is potentially suffering from a medical condition.

Spurling v. C&M Fine Pack

In *Spurling*, the employee worked the night shift at a packing plant in Fort Wayne, Ind. Beginning in 2009, the employee experienced a pattern of decreased consciousness and alertness, for which she received disciplinary warnings. In early 2010, the employee was found sleeping in the bathroom and was suspended. The employee stated her sleep issues were "caused by medication her doctor prescribed." The employee's wakefulness issues continued after returning from her suspension and she was issued a "Final Warning/Suspension." This document expressed that the employee was "suspended pending determination of the level of discipline you will receive for this latest incident." It noted possibility of termination.

The day after receiving the "Final Warning/Suspension," the employee informed human resources her issues "might be related to a medical condition."

An HR representative gave the employee an ADA form for her doctor to fill out. After receiving this form, the employee requested time off to determine "the extent of her medical issues."

That same day the HR representative made a recommendation to terminate the employee. The representative believed that providing the ADA form satisfied the "interactive process" to determine a reasonable accommodation required by federal law. It did not – as is explained below.

The employee's doctor filled out the form stating the employee suffered from a disability. The doctor recommended the employee receive periods of scheduled rest. The plant disregarded these recommendations and terminated the employee in late April 2010. On May 27, 2010, the employee was diagnosed with narcolepsy, which was manageable with proper medication.

The employee-turned-plaintiff sued her employer under the ADA and FMLA. The Federal Court of Appeals for the Seventh Circuit heard the case, which was on appeal from an earlier dismissal. The court first addressed the preliminary matter of *when* the plaintiff was terminated. If the plant knew of the plaintiff's condition, more was required of them under federal law before terminating the plaintiff.

In terminating an employee, an employer must (1) make a final, ultimate, non-tentative decision to terminate the employee and (2) provide unequivocal notice of its final termination decision. In *Spurling*, the HR representative's "recommendation" of termination neither manifested a clear intention to dispense with the plaintiff's services nor was any such intention communicated to her. The court found that the plaintiff had not been terminated until late April 2010 – two weeks after the plant learned of her potential medical condition.

Under the ADA, when an employer is notified of an employee's disability, the employer's liability is triggered for failure to provide accommodations. An employer must engage in an "interactive process" to determine whether an appropriate accommodation can be made. The HR representative initiated the process by giving the plaintiff the ADA form, but never followed

¹ 739 F.3d 1055 (7th Cir. 2014).

through upon receiving it. Instead of seeking clarification from the plaintiff or her doctor, the court found that the plant “chose to turn a blind eye and terminate her.” An accommodation could have been made, as the plaintiff merely needed further medical testing and a prescription to control her narcolepsy.

The court made clear: “if an employee tells his employer that he has a disability, the employer then knows of the disability, and the ADA’s further requirements bind the employer.” This includes engaging in an interactive process to determine whether a reasonable accommodation can be made. The court overturned the earlier ruling; the plant was liable under the ADA.

Next, the court considered the plaintiff’s FMLA claim. The FMLA requires an employee to “provide her employer with *sufficient information* to notify them that she has a *serious health condition* requiring FMLA protection.” An employer need not “divine or investigate” whether the law applies to every request for leave – the burden is on the employee to make it clear. The plaintiff, however, only said she needed time off to figure out why she was falling asleep. She could not have informed the plant of her narcolepsy, because she did not know of it until a month later. Sometimes, the court noted, a “drastic change in the behavior of a model employee” could put the employer on notice of a serious medical condition. However, in this case, sleeping on the job was a difficulty many night shift employees experienced. The court affirmed the earlier ruling; the plant was not liable under the FMLA.

Practical Tips for Employers

Returning to our hypothetical, and with guidance from the *Spurling* case, the following tips are recommended to employers when they learn an employee may be suffering from a health condition.

- **Be Clear and Unequivocal With Your Employment Decisions** – In *Spurling*, the employer would not have been found liable if it had terminated the employee when it originally wanted to. Instead, the employer was vague and indecisive. If you feel an employee’s performance is substandard, clarity in communicating the penalty, including termination, is the best practice.
- **Listen to Your Employees** – Assume that what you are told by your employees concerning a medical condition will be considered “knowing” of the condition. If you are told of an employee’s disability or request for leave for a “serious medical condition,” you should work with the employee before making adverse-employment decisions concerning them. The communication from the employee need not be precise – in *Spurling*, the

employee said her issues “might be related” to a medical issue.

- **Pay Attention to Drastic Changes in Work Performance** – Along the same lines, the court in *Spurling* noted that even without any communication, an employer can be on notice of a health problem affecting one of their employees if there is a drastic change in behavior of a model employee. It would be wise to communicate with this employee regarding the change and then appropriately follow up regarding the response you receive. This brings us to our next point.
- **Follow-Up** – If you are unsure as to whether a particular complaint rises to the level of a disability or serious medical concern, follow up with the employee, health care professionals, and attorneys. An employee may permit you to discuss otherwise confidential medical information with their doctor so that you can assess not only the severity of the condition for which the employee attributes poor performance, but also learn about potential accommodations.
- **Engage in the Interactive Process** – The “interactive process” is nothing more than working with an employee to produce a reasonable solution. But, in *Spurling*, the plant simply went through the motions. A judge may see through this. A better approach is to engage honestly and in good faith.
- **Make Reasonable Accommodations Where Necessary** – The term “reasonable accommodation” scares some employers, who worry that it will mean decreased production or increased cost. However, an open-minded approach to finding a reasonable accommodation may be less costly than facing an expensive lawsuit. Importantly, a reasonable accommodation is only necessary if the employee can still carry out the essential functions of his or her job.
- **Consult an Attorney** – The entire body of ADA and FMLA case law cannot be explained in one article or even one case. Consulting an employment attorney will inform your decision-making and keep you within the confines of federal and state employment law. This is particularly important when you identify an element of risk associated with a proposed employment decision, such as having knowledge of an employee’s medical issues.

Conclusion

The requirements of employment law are not intuitive. In the hustle-and-bustle of managing a company, it can be easy to overlook the need for communication with

your employees. However, when an employee communicates any sort of health issue, even in uncertain terms, you should begin thinking about your heightened duties under the Americans with Disabilities Act (ADA) and Family Medical Leave Act

(FMLA). Failure to do so, as shown in *Spurling*, can expose your company to costly litigation.

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