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Employees can't take liberties with provisions Of the FMLA

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You still have to comply with the law, even when you have the best of intentions. A recent decision by the First Circuit discussed the process for requesting and granting leave under the Family and Medical Leave Act (FMLA). The case was titled *Tayag v. Lahey Clinic Hospital Inc.*

The FMLA applies to employers of 50 or more, and allows employees who have worked at least 12 months and 1,250 hours to take up to 12 weeks of unpaid leave per year.

FMLA can be taken at the birth or adoption of a child. It also can be taken in the event of a serious health condition, or when an employee's immediate family member suffers a serious health condition and the employee is needed to care for that person.

The *Tayag* case involved the latter situation. *Tayag's* husband suffered from a series of serious medical conditions, including, the court explained, "gout, chronic liver and heart disease, rheumatoid arthritis, and kidney problems that led to a transplant." She started work at the hospital in 2002, and began taking FMLA leave to care for her husband as soon as she became eligible 12 months later, in 2003.

The hospital "consistently approved her requests for leave, which typically lasted one or two days," the court said.

Reading the facts as summarized by the court, one can only sympathize with *Tayag*. Her husband's health was a significant concern, and the *Tayags* apparently were a sincerely religious couple.

The court explained that in May 2006, she took vacation — not FMLA leave — to travel to Lourdes, France, which the court noted is "a major site for Roman Catholic pilgrimage and reputed miraculous healings."

Shortly after returning, in June 2006, *Tayag* submitted another request, asking to be absent Aug. 7 to Sept. 22, 2006. She requested the time as vacation, not FMLA leave.

The hospital denied her request, explaining it wouldn't be able to cover for her during that period. She then resubmitted her request, this time asking for it as FMLA leave.

The hospital's benefits department responded that it would need medical certification, which is an employer's right to demand under the FMLA.

Tayag obtained doctors' notes confirming her husband suffered from serious health conditions and that she would be needed to care for him on his trip — but the notes didn't certify that the trip was necessary for medical reasons.

Also, one of the doctors conceded in his note that her husband "presently" was "not incapacitated" and that leave wasn't necessary at the time.

The hospital denied the leave, and tried to call and did write *Tayag*. But by then, she had taken off work, departed the country and left no contact number.

Always There

Eventually she was terminated for failing to report for work.

Court decision

Although sympathetic to Tayag's situation, the First Circuit rejected her lawsuit.

She hadn't established the need for FMLA leave. She had left her employer in the lurch, not even giving it a way to contact her to discuss the situation. The FMLA doesn't allow an employee to simply leave work, absent exigent circumstances, and demand FMLA coverage after the fact.

The First Circuit also noted that the FMLA didn't seem to apply to her absence. During that time, she and her husband had gone to the Philippines, but apparently not for medical treatment. The court said, "While in the Philippines, [Tayag's husband] received no conventional medical treatment and saw no doctors or health care providers." Instead they went on a spiritual pilgrimage.

While Congress has written into the FMLA a provision allowing leave to be treated by "Christian Science practitioners," it doesn't cover every form of faith-based therapy.

Tayag argued that it was a violation of the Constitution's equal-protection clause to recognize only the Christian Science religion and not the Roman Catholic church.

The court disagreed, explaining that Congress wasn't "distinguishing among religions." Rather it was allowing treatment for people who, like Christian Scientists and unlike Catholics, are unable to seek traditional medical treatment.

Moreover, the court emphasized even if the FMLA were read to permit anyone of any faith to take leave for any type of faith-based treatment, leave still wouldn't be warranted here, where Tayag had been asked to provide medical certification, and the notes she gave didn't establish the need for leave.

Rather, the court noted the FMLA specifies the appropriate procedure in a situation like this.

Tayag and the hospital should have discussed the situation. A new health care professional might have been assigned to see her husband and certify whether or not leave was needed. Had Tayag not left the country, had she simply stayed in contact with her employer, she "might have been entitled" to request that.

Finally, Tayag claimed that her discharge was retaliation for having requested the time off as FMLA leave. The court made especially short shrift of this argument, noting, "[T]he discharge here was expressly for taking improper leave — not for filing a leave request — and no rational jury could find" otherwise.

The case is a good explanation of how employers can approach the process of granting FMLA leave. Employers and employees alike must comply with the FMLA's procedures.

This document is intended to provide you with general information about issues related to Human Resources. The contents of this document are not intended to provide specific legal advice. If you have any questions about the contents of this document or if you need legal advice as to an issue, please contact the attorney listed below or your regular Brownstein Hyatt Farber Schreck, LLP attorney. This communication may be considered advertising in some jurisdictions.

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