

The Family and Medical Leave Act

The Family and Medical Leave Act (FMLA), which Congress passed in 1993, is not a staple of most professional development for principals. Yet, its provisions have increasingly come into play in elementary school settings, and litigation has also notably surfaced.

The FMLA entitles eligible employees of covered employers to take unpaid, job-protected leave for specified family and medical reasons, with continuation of group health insurance coverage under the same terms and conditions as if the employee had not taken leave. The act and its regulations also include special rules for K-12 school employment, including restrictions on intermittent or reduced-schedule leave and return from leave near the conclusion of an academic semester for instructional employees.

The following case and the accompanying questions and answers illustrate the recent court decisions in the K-12 context. More specifically, they show the scope and application of the two avenues for FMLA suits: (a) interference with substantive rights under the act, and (b) retaliation for engaging in activity protected under the act.

The Case¹

Ms. B worked as an academic intervention specialist at an elementary school in Florida. State law required a three-year probationary period for tenure, with the district's option of a fourth year where performance evaluations warranted an extension.

As the only academic intervention specialist at her school, Ms. B's duties included providing intensive reading instruction to at-risk K-2 students. The instruction was for 40 minutes per day in groups of 3-5 students from 12 classrooms. When she was absent, the students did not receive this specialized instruction.

Starting at the same time as other teachers, Ms. B's school day began at

Even in a case where the plaintiff, a fourth-grade teacher, proved that the district's FMLA eligibility and designation notices were untimely and inadequate, the First Circuit Court of Appeals upheld summary judgment for the teacher had suffered no resulting harm.

7:30 a.m. Her initial duty was to monitor incoming student traffic outside of the school. Her instructional sessions commenced at 8:15 a.m. For the last part of her workday, which ended at 3:30 p.m., she supervised students outside the building as they departed.

As a result of a car accident, Ms. B suffers from chronic back pain and stiffness. For example, she occasionally needed a cane or the assistance of a co-worker to get from place to place. Her routine was to wake up early; begin to take her prescribed medications, including oxycodone and morphine, at regular intervals to allow them to take effect; and wait until the

varying pain and stiffness sufficiently subsided to drive to work. As a result, she had attendance problems.

In the second half of her second year, which was 2008-2009, the principal rated Ms. B as "needs improvement" for four items of the performance evaluation: punctuality, adhering to policies and procedures, carrying out assignments, and performing with a minimum amount of supervision. She did not request accommodation or FMLA leave upon receiving the evaluation. The principal provided additional training and supervision, but Ms. B was late for training meetings and did not perform well during the observations.

In the middle of her third year, Ms. B requested and received 12 weeks of FMLA-approved leave. For that school year, she had 11 additional absences and 12.8 hours of lateness. The principal continued to document his concerns to her via memos and performance evaluations, warning her that, if her attendance did not improve, he would not recommend her for tenure. In March 2010, he notified her that based on the ongoing performance issues, her probationary period would extend for a fourth year.

In November of her fourth probationary year, the principal met with Ms. B for a performance evaluation conference, confirming his concerns in a follow-up memo. In January, soon after another problematic performance evaluation, Ms. B formally requested an accommodation for her pain issues—specifically, to change her start time from 7:30 to 8 a.m. The principal declined her request because when he had done so informally the previous year, she still arrived late. As of late March, when the principal informed Ms. B that he would not be nominating her for tenure, she had 13 absences, including three that were FMLA-approved, and 42.8 hours of lateness. During the rest of that school year, she intermittently requested and received nine more days of FMLA leave. She also had other additional absences, and for

three of them she failed to arrange for a substitute per district procedure. On May 11, the superintendent informed her that her employment would terminate at the end of the school year.

Ms. B subsequently filed suit in federal court, including claims of interference and retaliation under the FMLA. The defendant district filed a pretrial motion for summary judgment.

What do you think was the judicial outcome of the defendant's summary judgment motion with respect to interference and retaliation under the FMLA?

In *Barron v. School Board of Hillsborough County* (2014), the court granted the district's summary judgment motion for Ms. B's interference claim. The court concluded that she had presented no evidence that the district had denied her requests for FMLA leave. Rejecting her specific contention that the termination of her contract while she was on approved leave constituted interference, the court determined that the timing of the termination decision was due to the ending of the school year, because (a) the principal had given her ample forewarning, and (b) she returned from the latest leave to complete the year. Moreover, the court cited precedent that the FMLA does not protect an employee who has requested leave from terminations for poor performance. The court's final reason was that Ms. B had excessive tardiness and absences beyond the leave that the FMLA protected.

Similarly, the court summarily rejected Ms. B's claim that the district terminated her in retaliation for her FMLA-protected activity. The reason, according to the court, was that "her performance issues, many of which were unrelated to her lateness and absence, began prior to her first request for FMLA leave, and continued in spite of ongoing feedback and additional support from staff members." Thus, the district had legitimate, nonretaliatory justification for her termination.

Is this decision representative of other recent FMLA cases in the K-12 context, including private schools?

Largely so. For example, in *Serlin v. Alexander School* (2014), the federal district court in Nevada rejected the interference and retaliation claims of an 18-year teacher at a private elementary school who had to use the bathroom approximately 10-20 times per day as a result of surgeries for breast cancer. She had repeatedly requested and received FMLA leave due to her breast cancer. Upon the nonrenewal of her contract, she filed suit, claiming interference and retaliation under the FMLA. The court granted summary judgment for her interference claim because the undisputed facts showed that her FMLA leave was not causally related to her contract nonrenewal. Similarly, the court summarily denied her retaliation claim for the lack of a causal connection.


Even in a case where the plaintiff, a fourth-grade teacher, proved that the district's FMLA eligibility and designation notices were untimely and inadequate, the First Circuit Court of Appeals upheld summary judgment for the district because the teacher had suffered no resulting harm. First, he failed to show that it was medically feasible to structure his FMLA leave differently. Second, even if the district had provided him with proper notice, he failed to show that he was able to return to work at the end of the applicable 12-week period (*Bellone v. Southwick Tolland Regional School District*, 2014).

However, the Second Circuit ruled that the plaintiff teacher in *Donnelly v. Greenburgh Central School District No. 7* (2012) had made an adequate showing of the requisite elements of an FMLA retaliation claim to proceed to a trial. More specifically, the court concluded that (a) he had the basic qualifications for tenure, including largely very favorable performance evaluations, (b) the denial of tenure was an adverse employment action, and (c) the circumstances of this action gave rise to an inference of

retaliatory intent because the downturn in his periodic evaluations arose soon after his FMLA-approved medical leave.

Conclusion

As the main case and other cited court decisions illustrate, the principal needs to be legally literate about the basic requirements of the FMLA. First, the principal should know the alternative eligibility situations. These alternatives arise from either the employee's medical condition, if serious enough to cause inability to perform employment duties, or to particular circumstances, such as birth, specific to the immediate family. Second, the principal should be aware of the consequent eligibility and designation notices. Third, the principal should have a basic knowledge of the FMLA entitlements in terms of leave duration and employment restoration. Fourth, although beyond the specific scope of this article, the principal should be aware of the overlapping coverage of Section 504 and the Americans with Disabilities Act at the federal level and unemployment compensation laws at the state level.

Finally and most importantly, within this basic framework, the principal should avoid interference with the employee's FMLA rights or retaliation against the employee's exercise of those rights. As the main case and the question/answer variations illustrate, neither of these protections shield the employee from adverse employment actions resulting from performance evaluation and other accountability activities for legitimate and separable reasons. As with many other legal matters, the key is to implement the legal balance of employee rights and employer responsibilities with reasonable knowledge and due diligence. 

Perry A. Zirkel is University Professor of Education and Law at Lehigh University.

1. Because the court's decision arose on the defendant-district's motion for summary judgment, the "facts" are merely allegations construed in the plaintiff's favor.