

Employees Cannot give Constructive Notice of need for FMLA Leave in the Eighth Circuit

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This suit arose when an employee at a food production company missed a month of work due to depression. She ultimately lost her job for failing to comply with the company's call-in procedure, which treated three consecutive absences without calling in as a voluntary termination of employment. The termination was executed despite the fact that the employee had intermittently taken leave under the Family and Medical Leave Act (FMLA) and that a coworker would notify the employee's supervisor when she was "sick." The employee filed FMLA entitlement (interference) and retaliation claims against the employer.

The U.S. Court of Appeals for the Eighth Circuit held that the employee's conduct did not give the employer notice of the employee's need for FMLA leave. This decision rejects the principle of constructive notice, by which an employee's unusual behavior can act as notice that something has gone medically wrong, or excuse notice, requiring the employer to extend FMLA benefits in the absence of a stated need for leave. The court relied on a regulatory change that brings into doubt whether extraordinary circumstances may make notice infeasible. This decision creates a conflict with the U.S. Court of Appeals for the Seventh Circuit — which recognizes constructive notice in the FMLA context — and could require U.S. Supreme Court resolution. In the meantime, employers in the Eighth Circuit may not be required to speculate as to an employee's need for FMLA leave before taking adverse employment action against an employee not complying with company policy. At the same time, employers should always exercise caution when taking adverse employment actions against employees who are taking FMLA leave — intermittent or otherwise.

For more information read *Bosley v. Cargill Meat Solutions Corp.*, No. 12-1290 (8th Cir. Feb. 5, 2013).

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