

## Labor & Employment Practice Group

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## Labor & Employment Update

### *FMLA Leave Abuse Triggers Employee's Lawful Firing, But Firing Suspected Malingerers Remains Risky Business*

By Nicholas Anaclerio

Can an employer's "honest suspicion" that an employee is abusing sick leave justify her discharge and insulate the employer from FMLA liability? According to a recent Seventh Circuit Court of Appeals decision, it can. But beware. Firing an employee for suspected malingering can still be risky business if he or she has made a workers' compensation claim. The firing decision may trigger a meritorious workers' compensation retaliation claim.

In *Vail v. Raybestos Products Co.*,<sup>1</sup> decided July 21, 2008, Diana Vail's employer, Raybestos, suspected that she was using leave given for migraine headaches to work in her husband's landscaping business. Her leave requests and headaches became more frequent during the summer and fall lawn mowing seasons and typically fell on weekdays, when her husband's cemetery customers preferred to have their lawns mowed. Raybestos ordered a surveillance, which confirmed that about 10 minutes after making a sick leave request directed by her physician, Vail left her home, filled two mowers at a local gas station, proceeded to a cemetery customer of her husband's business, and helped another worker mow the lawns. Raybestos fired Vail the same day.

Before finding Vail's termination lawful and affirming a summary judgment against her, the Seventh Circuit framed the issue before it in her appeal as "whether she was abusing her leave or whether Raybestos interfered with her [FMLA] rights when it fired her." To prove unlawful interference, an FMLA claimant must show she was eligible for leave and took it "for the intended purpose." Consequently, an employer can defeat an interference claim by proving that its employee did not take leave for the intended purpose. Significantly, the *Vail* court noted that the employer's right to deny reinstatement to an employee who misuses leave means that it may refuse to reinstate an employee based on an "honest suspicion" that she was abusing leave.

The *Vail* court found that Raybestos "clearly made this showing;" that its surveillance officer's report sufficed as a matter of law to give it an "honest suspicion" that Vail was using her leave to help her husband's business rather than for the "intended purpose," her migraines; and that "Raybestos did not violate Vail's rights under the FMLA."

The *Vail* decision teaches that, while employers may not interfere with employees' rights to take FMLA leave for its intended purpose, they may lawfully discharge employees who abuse leave by taking it for unintended reasons. But beware! Illinois workers' compensation law makes it equally clear that the surveillance and subsequent discharge

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of an employee for malingering while on workers' compensation leave may demonstrate retaliatory intent and prove the employee's wrongful discharge action as a matter of law.

In *Clark v. Owens-Broadway Glass Container*,<sup>2</sup> the court dealt with another lawn-mowing employee much differently than the *Vail* court dealt with Diana Vail. The employer in *Clark* fired the plaintiff because it believed that she had filed a false workers' compensation claim and was malingering after its private detective videotaped her mowing her lawn before her medical release to work. The *Clark* court affirmed a summary judgment for the employee in her retaliatory discharge suit, finding a causal connection between her protected workers' compensation claim and her discharge because her employer fired her believing she fabricated the claim.

The *Vail* and *Clark* decisions demonstrate how critical relatively subtle distinctions can be in the outcome of a wrongful discharge case. Had the *Vail* plaintiff been discharged while on workers' compensation leave or the *Clark* plaintiff fired while on FMLA leave, the outcomes of their respective cases might well have been entirely different. Workers' compensation, FMLA and ADA leave issues are among the most challenging and frequently confronted problems facing management and human resources professionals today. Carefully consider the risks of terminating or otherwise disciplining employees who've asserted rights under these laws before you act. And consider reviewing your best claims avoidance strategies and compliance options with skilled labor counsel before implementing a course of action.

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<sup>1</sup> *Vail v. Raybestos Products Co.*, U.S. Court of Appeals, 7th Circuit Case No. 07-3621 (July 21, 2008).

<sup>2</sup> *Clark v. Owens-Broadway Glass Container*, 297 Ill.App.3d 694, 697 N.E.2d 743 (5th Dist. 1998).

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