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# Employer Pays for Precipitous Discharge of Employee Needing FMLA Leave

*By: Karen L. Piper, Member, Workplace Law Practice*

Tracy Wink worked as a clerical employee of Miller Compressing Company from 1999 to 2012. She was experienced and "highly valued." In July 2011 Wink requested and was granted intermittent leave under the Family and Medical Leave Act ("FMLA") to take her autistic two-year-old son to medical appointments and therapy. In February 2012 Wink's son, who attended day care two days a week, was expelled from day care because of his aggressive behavior which was a product of his autism. Wink then asked if she could work from home those two days a week and use FMLA leave when she needed to care for her son. She submitted an FMLA certification from her son's health care provider. The certification stated Wink's son had autism and was a danger to himself and others. Wink's request was granted. Wink began to work from home two days each week. The time she spent caring for her son while at home was counted as FMLA leave.

During the summer of 2012, Wink's employer was experiencing serious financial problems. The employer canceled all telecommuting arrangements. Wink was called in by Human Resources on a Friday afternoon and told that beginning on Monday she would have to work in the office eight hours a day, five days a week. Human Resources told Wink that she could not use FMLA leave to care for her son except for doctor's appointments and therapy.

Wink was unable to arrange alternate day care for her son over the weekend. On Monday morning Wink went into work to let them know. Wink was told that as soon as she missed work she would be terminated. Wink did not have child care for that day and left the office. Human Resources processed her termination, retroactive to the previous Friday.

Wink sued for FMLA retaliation. The case was tried, and a jury found Wink's termination was in retaliation for her use of FMLA leave. Wink was awarded lost wages, liquidated damages and attorneys' fees. The employer appealed.

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The U.S. Court of Appeals for the Seventh Circuit (covering appeals from the federal courts in Illinois, Indiana and Wisconsin) affirmed the jury's verdict in Wink's favor. It ruled that autism is a serious health condition, and the FMLA allows an employee to work a reduced schedule when needed to care for a sick child. *See 29 C.F.R. § 825.124*.

**The U.S. Court of Appeals for the Seventh Circuit . . . ruled that autism is a serious health condition, and the FMLA allows an employee to work a reduced schedule when needed to care for a sick child.**

Wink was entitled to reduced schedule FMLA leave to provide routine care for her autistic son, not just intermittent FMLA leave for doctor's appointments and therapy. Wink had successfully worked a reduced leave schedule for several months. Her employer had "no compelling reason to fire her." *Wink v. Miller Compressing Co.*, Case Nos. 16-2336, 16-2339 (7th Cir., January 9, 2017).

FMLA issues can be challenging. This employer presumably canceled Wink's arrangement because it wanted to treat all employees the same. When it experienced financial problems, it canceled all telecommuting arrangements. However, in its desire to be consistent, the employer overlooked Wink's entitlement to FMLA leave to care for her son.

The employer acted rather quickly. Wink was a long-term, valued employee. If Wink had been given additional time, she might have been able to find alternative day care for her son, or she might have been able to find another job that could accommodate her need to work at home two days a week and left on her own. Even if Wink had been granted leave for two days a week, she might have left on her own when her FMLA leave ran out. FMLA leave entitlement is the equivalent of up to 12 weeks or 60 days. Wink had already been on a reduced schedule for approximately five months. At two days per week, her leave entitlement would have been exhausted within a few months.

***About the Author. Karen L. Piper*** *represents and counsels employers on employment law issues. She has conducted a number of employment investigations and training seminars for a variety of clients and has also successfully defended numerous discrimination and wrongful discharge cases at the administrative, trial, and appellate levels. Karen is a frequent speaker and writer for national and local industry associations.*

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