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## CAN I FIRE AN EMPLOYEE FOR SLEEPING ON THE JOB? DON'T FORGET ABOUT THE FMLA!

We've [blogged in the past](#) about employees caught sleeping on the job. Most employers would say that an employee who is caught sleeping on the job will usually end up getting fired, and that is usually fine! However, where that employee suffers from a disability or a serious health condition, an employer will need to consider the impact of the ADA and the FMLA prior to making any employment decisions.

In a recent case decided by the Northern District of Ohio, the court determined that a hospital that terminated a night shift nurse's employment because she was caught sleeping on the job did not interfere with nurse's right to FMLA-protected leave, nor did it retaliate against the nurse for taking FMLA-protected leave. However, in reaching this conclusion, the court suggested that, in some situations, termination of an employee who falls asleep at work may be problematic under the FMLA.

In this case, the plaintiff suffered from chronic migraines. As a result of her migraines, the plaintiff requested and was approved for intermittent FMLA. She was granted all the FMLA leave she requested, including an occasion when she developed migraine symptoms during her shift. One evening, the plaintiff began experiencing migraine symptoms. While talking with a patient, the plaintiff became dizzy, so she left the patient's room, went to an empty room and "collapsed onto the bed." Some time later, a coworker found her sleeping and woke her up. The plaintiff later went to the emergency room, where she received treatment for her migraine condition. The plaintiff's employment was subsequently terminated for sleeping on duty in accordance with hospital policy.

The plaintiff alleged FMLA interference and retaliation, as well as violation of Ohio's disability discrimination law.

With regard to the plaintiff's **FMLA retaliation** claim, the court held that sleeping on the job is a legitimate, nondiscriminatory basis for termination when the employer has a clearly established policy. Further, the reason given for the plaintiff's termination was not pretextual – the hospital honestly believed that the plaintiff intentionally went to sleep in an empty room.

With regard to the **FMLA interference** claim, the court held that the plaintiff failed to give her employer notice of her intention to take leave and, therefore, the hospital did not interfere with her right to take FMLA leave. Specifically, the court held that the plaintiff was aware of the hospital's established notice procedure (which the plaintiff had previously agreed to) and had several opportunities to inform the hospital that she was suffering from her FMLA-related condition, both during and after her shift, but she failed to do so. In holding that the plaintiff failed to prove FMLA interference, the court stated that, while an employee seeking FMLA leave need not mention the statute expressly, she must *at least convey enough information to let her employer know that she is requesting leave for a serious health condition that renders her unable to perform her job*. Here, the plaintiff told no one that she experienced a sudden, incapacitating migraine. She didn't contact her supervisor. She didn't let anyone know that she was going to lie down. She didn't ask for assistance for herself or her patient. In the days following the incident, the plaintiff didn't respond to voicemails, phone calls or emails, and she didn't request FMLA leave for the incident. As such, the court found that the plaintiff did not provide sufficient notice of her intent to take leave.

### TAKEAWAYS FOR EMPLOYERS

While it might seem obvious that an employer can fire an employee for sleeping on the job, that may not always be the case. Here, the court suggests that, had the plaintiff provided *notice* of her need for leave under the FMLA, then the outcome of this case may have been different.

The FMLA regulations are clear that an employee must comply with the employer's usual and customary notice and procedural requirements for requesting leave, absent unusual circumstances. However, the regulations also state that:

if an employee requires emergency medical treatment, he or she would not be required to follow the call-in procedure until his or her condition is stabilized and he or she has access to, and is able to use, a phone. Similarly, in the case of an emergency requiring leave because of a FMLA-qualifying reason, written advance notice pursuant to an employer's internal rules and procedures may not be required when FMLA leave is involved.

29 C.F.R. §825.303. In this case, if the plaintiff had suffered from a medical emergency that caused her to fall asleep, and if she had notified her employer of that emergency, the outcome of this case may have been different.

Similarly, **as we have previously explained**, if an employee has a “disability” under the ADA, the ADA requires his or her employer to engage with the employee in an “interactive process” to determine the appropriate accommodation under the circumstances.

In light of both the FMLA and the ADA, employers should be cautious and consult legal counsel where an employee has alleged that his or her disability or serious health condition has caused him or her to fall asleep while on duty.

Reference: **Lasher v. Medina Hospital, et al.** (Northern District of Ohio, No. 1:15CV00005, February 5, 2016).