



## Employers Must Be Cautious When Taking Action Against Employees Who Vacation While On Medical Leave

Can a Massachusetts employer fire an employee who is on authorized medical leave but uses some of the time off to go on vacation? Not without risk. A recent case from the Supreme Judicial Court warns that employers must be cautious when dealing with employees whom they suspect to be abusing their medical leave benefits.

In *DaPrato v. Massachusetts Water Resources Authority*, an employee went on vacation during the final two weeks of paid medical leave. 482 Mass. 375, 377 (2019). Prior to having foot surgery, the employee's doctor estimated that recovery would take three to four weeks, after which the employee could slowly transition to putting weight on his right foot. Two weeks prior to returning from medical leave, the employee went on a planned beach vacation. The employee's manager was aware of the vacation dates as well as the activities that the employee expected to engage in while on vacation.

An employer may not treat the mere fact that an employee went on vacation while on medical leave, standing on its own, as grounds for an adverse employment action.

Upon the employee's return to work, the employer launched an investigation into the propriety of the employee's medical leave, reasoning that an employee who is seriously ill or disabled should not be able to vacation. The employer obtained video recordings showing the employee walking, driving, and lifting

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NEWSLETTER • SEPTEMBER 2019

### Firm News



Brendan Cox

Laredo & Smith welcomes trial attorney Brendan Cox to the firm as Of Counsel. He brings to the firm a strong practice in business and employment law, as well as criminal defense.



Payal Salsburg

Payal Salsburg volunteers at the BBA's CORI sealing clinic, a pro bono project that connects low-income clients with free legal services for sealing their criminal records.



Matt Kane

Matt Kane was selected for inclusion in the 2020 edition of *The Best Lawyers in America*® for his work in Commercial Litigation.

Payal Salsburg and Matt Kane presented to the staff at Boston Children's Hospital regarding recent changes to school discipline laws in the Boston Public Schools.

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luggage out of his car. The employer also found photographs showing the employee fishing, and standing on a boat posing with a large fish he had caught. Despite the employee's explanation that his conduct was consistent with the limitations described in his medical leave forms, the employer terminated his employment.

The employee sued and the jury returned a verdict for the employee. On appeal, the SJC affirmed stating that the FMLA makes it unlawful for an employer to interfere with or deny the exercise of FMLA rights, retaliate for exercising FMLA rights, or use the taking of FMLA leave as a negative factor in employment actions. An employer may not treat the mere fact that an employee went on vacation while on medical leave, standing on its own, as grounds for an adverse employment action.

So, what can an employer do when faced with a similar situation? According to DaPrato, an employer may validly consider an employee's conduct on vacation – or, for that matter, anywhere – that is inconsistent with his or her claimed reasons for medical leave, when the employer has information suggesting that the leave has been improperly used. However, before the employee may be discharged, there must be a “strong inconsistency” between the activity in which the employee engages and the reason why the medical leave was taken. For example, an employee who goes to the beach while recovering from foot surgery (or an immobilizing ailment) could still be in full compliance with medical leave instructions if he relaxes by the water with his foot elevated. However, if the employee were to climb Machu Picchu, that activity would be strongly inconsistent with the claim for medical leave based on recent foot surgery.

In addition, an “honest belief” by the employer that the employee has abused medical leave privileges does not absolve the employer from liability. If at all, any good faith or honest belief is only pertinent to the amount of damages.

Employers in Massachusetts who suspect that an employee is abusing medical leave must engage in a robust investigation of the situation, including determining the stated reasons for the medical leave, the expected recovery time, the limitations on the employee's activities, and the conduct the employee engaged in while on medical leave. A failure to conduct a thorough investigation prior to termination could lead to a presumption that the decision to terminate the employee is tainted by unconscious bias.

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