

# A Seventh Circuit Reminder: Consistency is Key

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The Family Medical Leave Act (FMLA) and the Americans with Disabilities Act (ADA) both provide protected time off for employees with certain medical conditions. The ADA protects individuals with disabilities from discrimination, and the FMLA provides 12 weeks of leave during a 12-month period to qualified employees for qualified health reasons. The qualifying health reasons under the FMLA and disabilities protected under the ADA are defined extensively within both Acts. Each Act also protects employees from retaliation by the employer for asserting their right to utilize protected leave. To prove a retaliation claim under the FMLA and the ADA, an employee must prove: (1) he or she engaged in a protected activity; (2) the employer took a materially adverse action against the employee; and (3) the protected activity is what caused the adverse action. An action is materially adverse if it would have dissuaded a reasonable worker in the plaintiff's position from taking time off of work under either the FMLA or ADA.

In *Freelain v. Village of Oak Park*, 888 F.3d 895 (7th Cir., 2018), the plaintiff, Rasul Freelain, was a police officer who had worked for the defendant, the Village of Oak Park, since 2002. The co-defendant, Dina Vardal, was a Sergeant within the police department. *Freelain*, 888 F.3d at 899. In 2012, the plaintiff spent several weeks off of work to address some stress-related medical ailments following a sexual harassment claim he made against



Vardal. *Id.* Plaintiff was required to utilize his accrued paid sick time while he was off of work for his medical leave. After plaintiff was released to work by his treating physician, he met with the Chief, who informed him that the sexual harassment investigation was unfounded and they would not be pursuing any action against the Sergeant. Due to the nature of his ailments and his position as a public safety officer, the plaintiff was also advised that he would have to pass a psychological evaluation prior to returning to duty. Plaintiff then requested secondary employment, which was approved three months later. *Id.*

The plaintiff filed his lawsuit alleging that his employer retaliated against him in three ways. He claimed, (1) the employer misclassified his leave time in a way that was materially adverse; (2) the employer retaliated by requiring a psychological evaluation prior to his returning to work; and (3) the employer's three-month delay in approving his request for secondary employment was materially adverse. *Freelain*, *Id.* at 900. The employer filed a motion for summary judgment, and the Northern District of Illinois granted the employer's motion. *Id.* The Seventh Circuit affirmed the decision on April 30, 2018. *Id.* at 906.

The Seventh Circuit found that no retaliation exists under the FMLA or the ADA when granting unlimited unpaid leave to a police officer in

addressing his medical ailments. *Freelain*, 888 F.3d at 901. There was no evidence that the employer in this case acted inconsistently with its normal paid leave practices, and the plaintiff provided no evidence that the employer took any materially adverse actions against him in retaliation for use of the medical leave time. *Id.* at 906. In making this determination, the Seventh Circuit explained that the FMLA does not require employers to pay employees when they are utilizing family or medical leave. *Id.* at 901. It further advised that employers are permitted to apply any paid leave it provides its employees while the employees utilize FMLA leave and are not otherwise required to pay the employee for time off under the FMLA or ADA. *Id.* at 902. Since the employer acted consistently with the FMLA, the plaintiff was required to show that the employer acted inconsistently with its normal leave practices in order to show that the actions taken by the employer were retaliatory in nature. *Id.* at 901.

The court found the plaintiff was unable to show the employer acted inconsistently with its normal leave practices and the plaintiff failed to show that the employer acted in a way that was materially adverse against him. *Freelain*, 888 F.3d at 901. With regard to the plaintiff's misclassification claim, the court held that the employer did not act with malice or recklessness, and the misclassification of leave time caused plaintiff no harm as the plaintiff was eventually made whole by restoration of his sick leave and compensation for any unpaid time he spent on leave. *Id.* at 903. Further, the employer's requirement that the plaintiff undergo a psychological

did not act with malice or recklessness, and the misclassification of leave time caused plaintiff no harm as the plaintiff was eventually made whole by restoration of his sick leave and compensation for any unpaid time he spent on leave. *Id.* at 903. Further, the employer’s requirement that the plaintiff undergo a psychological evaluation prior to returning to duty was reasonable as the plaintiff was a public safety officer and had spent several weeks off of work as a result of stress-related ailments. *Id.* at 903-904. Finally, the court found the employer’s three-month delay in approving the plaintiff’s secondary employment request was not retaliatory as such decisions are discretionary and the plaintiff was not singled out for the delay. *Id.* at 905.

The *Freelain* case highlights the importance of consistent employment practices, particularly in areas governed by statute. Each situation requiring the use of leave time under the FMLA or ADA is distinct. While the FMLA and ADA provide protections for employees, these statutes also provide guidance to employers with regard to implementing policies that can be applied in all situations in order to protect employers from being found liable in retaliation cases. It is important to know the situations for which the FMLA and ADA provide protection and to have a process in place that allows for the employee to utilize the leave time. While an employer is not required to pay an employee while they take time off of work under the FMLA, they must act

consistently in granting leave to avoid an appearance of any employee being singled out. The Seventh Circuit reminds us that “federal courts do not second-guess personnel decisions that lie within the reasonable discretion of employers.” Consistency is key. *Freelain*, 888 F.3d at 903.



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