



National Postal Mail Handlers Union

THE BREAKDOWN

FMLA Covers Leaves of Only a Few Minutes During Workday

In *Collins v. The United States Playing Card Co.*, No. 1:05CV637 (S.D. Ohio Nov. 6, 2006), the employer moved for the dismissal of the employee's FMLA interference claim arguing that the employee's requests for breaks of a few minutes each during the course of the workday to get something to eat (he had diabetes) were not covered by the FMLA. The court disagreed. The Court found that leave during the workday by a diabetic employee in order to eat to correct low blood sugar when medically necessary may qualify as intermittent leave under the FMLA. The Court initially noted that there is no limit on the size of an increment of leave when an employee takes intermittent leave under the FMLA. The Court distinguished the two cases proffered by the company as support for its position that Collins' unscheduled breaks were not protected by the FMLA, *Mauder v. Metropolitan Transit Auth.*, 446 F.3d 574 (5th cir. 2006) and *Hensley v. Cooper Standard Automotive*, 2005 WL 1981448 (E.D. Tenn. Aug. 17, 2005).

In *Mauder*, the plaintiff employee was diabetic. He did not advise his employer that he had been diagnosed with diabetes. The insulin prescribed by Mauder's doctor had a side effect of uncontrollable bowel movements. As a result, Mauder made frequent trips to the bathroom that were not always at the scheduled break time. Mauder did not inform his supervisor of his medical condition until she emailed him concerning his tardiness in returning from scheduled breaks. When his supervisor asked Mauder to provide more information regarding his medical condition, Mauder refused. The Court found that Mauder failed to demonstrate that his medical condition left him incapacitated as required by the state, and thus he was not entitled to FMLA leave.

The Court distinguished Mauder by finding that Collins informed his employer of his condition with supporting medical certification of his need to leave. The Court concluded that Mauder did not find that the FMLA does not allow for periodic time away from one's work station. Rather, the *Mauder* court merely expressed in dicta that it had been "unable to locate a case where 'temporary' FMLA leave was awarded in such a context-where the leave given does not constitute time away from work, but merely periodic time away from a desk throughout a work day."

In *Hensley*, the plaintiff had undergone rotator cuff surgery and was required to perform 15-to 20-minute physical therapy exercises, which she did each day at work in the first-aid room. The employer terminated Hensley for sleeping in the first-aid room. Hensley sued alleging that she was never informed that intermittent FMLA leave was available, and that her termination violated the FMLA. The court concluded that the 15- to -20-minute exercises did not qualify as intermittent FMLA leave.

The Court in *Collins* distinguished *Hensley* noting that Hensley never applied for intermittent FMLA leave for her exercises and Hensley had not been provided notice from her employer that she was eligible for FMLA leave. Collins, on the other hand, specifically requested intermittent FMLA leave to take breaks due to his medical condition.

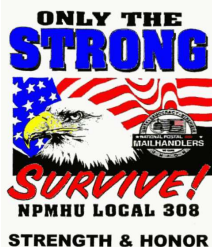
The Court looked favorably on the decision in *Sabbrese v. Lowe's Home Centers, Inc.*, 320 F.Supp. 2d 311 (W.D.Pa. 2004). In that case, a diabetic employee was required to eat a scheduled interval in order to control his blood sugar. One day Sabbrese left for lunch early in order to eat because he was feeling lightheaded and nauseous. He was disciplined for leaving his post early. He was terminated when he made physical contact with his supervisor at the disciplinary meeting.

Relying on *Sabbrese*, the DOL regulation that there is no limit on the size of an increment of intermittent leave, and Collins' eligibility for intermittent leave, the Court found that *Collins* may pursue his FMLA interference claim on the basis that the period of time for which he sought leave can qualify as intermittent leave under the FMLA.

Comment: I believe the decision is a correct interpretation of the DOL intermittent leave regulations. According to the Court in *Collins* and *Sabbrese*, intermittent FMLA leave is available for brief periods of absence from working, even though the employee remains at work.

The decision is directly relevant to employees covered by Title I (Postal employees and other non-civil servants), the CAA (congressional employees), and the PEOAA (employees of the Executive Office of the President).

The decision is also applicable to civil service employees covered by Title II of the FMLA (the OPM regulations). However, the amount of leave that an Agency may charge the employee will depend on Agency policy. If the Agency has established a minimum charge of leave of less than one hour, as permitted by 5 CFR 630.206, the Agency can charge the employee with FMLA leave with that minimum amount. If the Agency has not established a minimum leave charge of less than an hour, then the minimum leave charge is one hour, even if the leave taken only lasts 15 minutes. Under the DOL and CAA regulations, only the actual amount of intermittent leave taken may be charged against the employee's annual 12 week FMLA leave entitlement. Arbitrator Carl C. Bosland, Esq



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