

Supervisor's Inadvisable Email Creates Basis for FMLA Claim

By [Jeff Nowak](#) on October 31, 2011



File this in your "Don't Do This When Conducting a RIF" folder. As highlighted by the folks at the [Atlanta Employment Lawyer Blog](#), employers should be wary of eliminating the position of an employee who announces days earlier that he will need several weeks off for surgery. When the evidence shows that this employee was not targeted for the layoff before he requested FMLA leave, but only after, it may well be enough to allow him to present his claims to a jury.

The Facts

William Shaffer was the Director of Leadership Communications for the American Medical Association (AMA). In 2008, when the economic downturn was taking shape, the AMA cut internal budgets. When initial cutbacks were not enough, the AMA slated various staff positions for elimination. Shaffer's boss indicated that it would be an "obvious choice" to eliminate the position of another employee in Shaffer's Department because this employee's duties had changed significantly and, in any event, the AMA had stopped work on one of his core campaigns. When Shaffer's boss was asked on October 28 whether Shaffer should be slated for layoff, he did not believe cutting additional positions was necessary, including Shaffer's position. The decision appeared to make sense.

However, the boss suddenly had a changed of heart. On November 20, Shaffer asked for FMLA leave for knee replacement surgery. Four to six weeks, to be exact. By November 30, Shaffer's supervisor changed his tune, recommending now that Shaffer's position be eliminated. Specifically, he stated in an email to his superiors: *"The team is already preparing for Bill's short-term leave in January, so his departure should not have any immediate negative impact."* Ugh.

Not surprisingly, Shaffer filed suit shortly after his termination.

The Court's Ruling

In reversing the decision to grant summary judgment to the employer, the Seventh Circuit Court of Appeals in [Shaffer v. American Medical Association](#) held that the supervisor's "11th hour" decision to terminate Shaffer, as well as the inconsistent decisionmaking as documented (e.g., shredded handwritten notes, notes that were dated months before they were written), could have created a "paper trail" that acted as a cover up to unlawful conduct. As a result, the court decided that a jury should hear Shaffer's FMLA retaliation claim.

FMLA Insights

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Insights for Employers

The advice might seem a bit obvious here, so let me put it succinctly: 1) When you shift course and decide to terminate an individual not initially slated for layoff (and especially after they request protected leave), your thought process and documentation must be precise and well reasoned; and 2) when you actually document, be consistent, thorough and careful. What clearly was convincing to the Court was the supervisor's email -- a missive that specifically referenced Shaffer's request for FMLA leave. Although Shaffer's request for leave may have had nothing to do with his actual layoff, the content of the email put Shaffer in a good position to argue that a jury should decide whether the need for leave was a motivating factor in the decision to eliminate the position. This is yet another example of the importance of FMLA training for supervisors and employees who manage employees with medical conditions.

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