

FMLA: Job Cut Back During Leave, Reinstatement Not Required.

A patient care technician working in a dialysis center had to take medical leave for back surgery.

The patient census was declining and her hours had already been reduced to 24 per week. The decline continued while she was out on leave. When she was ready to come back to work it was necessary for hers and others' hours to be reduced further, or for one aide to be laid off. She was picked for layoff because of concerns over her job performance which had come to light during her leave.

She filed suit for retaliation for using medical leave guaranteed to her by the US Family and Medical Leave Act (FMLA).

An employee returning from leave guaranteed by the Family and Medical Leave Act has the right to be restored to the same or an equivalent position.

Unexcused failure to restore the employee is retaliation for which the employee can sue.

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT
March 9, 2007

The US Court of Appeals for the Tenth Circuit resolved the case in favor of the dialysis center by pointing out that a declining patient census or change in case-mix can be legitimate reasons for denying an employee reinstatement.

That is, if the employee's hours would have been reduced or the job eliminated even if the employee had not taken FMLA leave, there is no retaliation. Campbell v. Gambro Healthcare, Inc., __ F. 3d __, 2007 WL 706934 (10th Cir., March 9, 2007).