

## **CLIENT ALERT: Massachusetts Supreme Judicial Court Confirms Employer May Not Presume a Vacation Violates Terms of Medical Leave - By Danielle Jurema Lederman**

Determining whether an employee has misused or misrepresented his medical condition while taking leave under the Family and Medical Leave Act (“FMLA”) may not be as straightforward an analysis as it seems. In *DaPrato v. Massachusetts Water Resources Authority*, the Massachusetts Supreme Judicial Court (“SJC”) upheld a jury’s award to an employee who was terminated from employment after his employer learned that he had taken a vacation while out on FMLA leave.

In *DaPrato*, a long-time employee was approved by his employer, the Massachusetts Water Resources Authority (“MWRA”), to take FMLA leave for several weeks to recover from foot surgery. Following the surgery, the employee asked to extend his leave and, as he had exhausted his paid time off, also requested that he continue to receive his salary through a program offered by his employer. Both of these requests were approved.

During the last two weeks of FMLA leave, the employee went on a pre-planned vacation to Mexico. Upon his return, when the MWRA learned of the vacation, the employee was terminated from employment for his misuse of FMLA leave and his presumed misrepresentation of his medical condition.

Following a trial, the jury determined the employee was terminated in retaliation for taking FMLA leave and expressing his intent to take such leave again in the future. The jury found the MWRA liable for retaliatory termination and DaPrato was awarded almost \$2 million, which included \$715,385 in punitive damages and \$616,886 in compensatory damages.

In affirming the jury’s award, the SJC noted that an employee is not necessarily prohibited from taking vacation while on FMLA leave. In determining whether an employee’s conduct is an abuse of FMLA leave, the Court stated that an employer may validly consider an employee’s conduct while on leave only where such conduct is inconsistent with the reason for leave and when the employer has such information at the time it is evaluating whether the leave has been properly used.

The SJC went on to emphasize that the employee’s activity on vacation in this instance was not inconsistent with his need for medical leave. As the Court wrote, “DaPrato took FMLA leave to allow his foot to recover fully from surgery. Such recovery could take place in a warm climate as well as in a New England winter.” In defining activity that is inconsistent with an employee’s need for medical leave, the SJC stressed, “[a]n employee recovering from a leg injury . . . may not climb Machu Picchu without abusing the FMLA process. Careful consideration of the reasons for the medical leave and the activities undertaken, including the timeline for rehabilitation and recovery, are required to determine whether the FMLA leave has been abused.”

The *DaPrato* decision reminds employers to conduct a thorough investigation prior to taking any adverse action against an employee for abusing FMLA leave. Specifically, employers should carefully consider and assess all of the relevant evidence, including documents submitted to support an employee's request for FMLA leave, in order to determine whether an employee's activities while on leave were inconsistent with the need for the leave.

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This alert was prepared on June 19, 2019.

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