

## Does FMLA Caregiver Leave Include a Hawaiian Vacation?

Six weeks ago, Peter requested FMLA leave to care for his wife, who has terminal cancer. He provided medical certification and complied with all requirements for taking FMLA leave. His leave was designated as FMLA for a period of 12 weeks.

Yesterday, Julie, Peter's coworker, told you that she saw pictures on Instagram of Peter and his wife on Waikiki Beach. Julie then showed you the pictures. Peter's wife appears to be the picture of health and, from what you have seen, they appear to be thoroughly enjoying their Hawaiian getaway with snorkeling, surfing, kayaking, and other strenuous physical activities.

You are shocked by this information and disappointed that Peter would abuse FMLA in such a manner. Your first instinct is to terminate Peter's employment, but is this allowable? How should you proceed?



- A. Peter should be terminated. He was clearly lying about his need for FMLA leave.
- B. Peter should remain on FMLA leave and should not be disciplined for how his time on FMLA was spent. Peter provided all of the required information to take FMLA leave to care for his wife. It is not your place to question his methods for providing care for his wife.
- C. Call Peter and instruct him to return to work immediately, since the pictures prove that his wife no longer needs him to care for her.
- D. Conduct an investigation and make a determination as to whether Peter is actually abusing FMLA leave.

**The correct answer is D:**

### Explanation

Understandably, any employer would be upset to learn that an employee is vacationing in Hawaii while on FMLA caregiver leave. However, it is important not to rush to judgment and to conduct a complete investigation of the facts at issue to determine whether FMLA abuse is actually occurring.

In this case, the employer should try to contact Peter and ask him about the pictures. In a situation where an employee is acting as a primary caregiver for a family member, there is no requirement that the "care" provided be connected to the family member's ongoing medical treatment. Instead Peter's trip to Hawaii may still constitute legitimate caregiver leave if Peter continued to act as his wife's caregiver during the trip.

Peter's situation is similar to that in a 2014 federal court case (*Ballard v. Chicago Park District*). In that case, an employee had requested FMLA to accompany her terminally ill mother on a vacation to Las Vegas. The trip was for pleasure and not related to the mother's medical treatment and the

employee and her mother engaged in typical tourist activities.

The employee was her mother's primary caregiver at home and continued in that role (i.e. assisting her mother with basic medical, hygienic and nutritional needs) while they were in Las Vegas.

The employer terminated the employee for FMLA abuse – claiming that the employee's need to provide care to her mother while on this trip needed to be connected with her mother's ongoing treatment to be protected by the FMLA. The Court, however, disagreed. Instead, the Court held "care" under the FMLA does not require medical treatment and is not restricted to any particular place.

Remember it is very difficult to verify that an employee is actually using FMLA leave to care for an ill family member. Never assume that an employee is abusing this type of FMLA leave just because you learn that the employee is engaging in conduct that seems inconsistent (in your opinion) with providing care. Instead, investigate the situation and gather all of the fact you can. Finally, before taking any adverse action, consult with an HR Professional or a qualified employment attorney.