

\n\n"); ubertags\_renderMarkup(container, bezen.nix);



[Home](#) | [Contact Us](#) | [SHRM Foundation](#) | [SHRM India](#) | [HR Certification Institute](#)

Welcome David J. Riewald ▾



Leading People.  
Leading Organizations.

World's Largest HR Event. [Be There!](#)

[Ask an Advisor](#) | [HR Jobs](#) | [HR Talk](#) | [SHRM Connect](#) | [SHRM Store](#) | [HR Standards](#)

SEARCH

MEMBER TOOLS

Select...

> [Find a Chapter](#)  
> [Member Directory](#)

[Logout](#)

## Employer May Terminate Employee Who Exhausts FMLA Leave

3/12/2012

By Katherine A. Phillips

An employer did not violate the Family and Medical Leave Act (FMLA) or the Kansas Workers Compensation Act (KWCA) when it terminated an employee who exhausted his medical leave and was not cleared to return to work by the company doctor, the 10th U.S. Circuit Court of Appeals held.

Terry DeGraw worked as a material handler at Exide Technologies from 2001 until his termination in January 2007. The job of a material handler requires that an individual be able to lift up to 80 pounds and to walk, sit, bend and twist. DeGraw had a history of nonwork-related back problems and took FMLA leave for those back problems four times between 2001 and July 2006. Before returning to work in July 2006, DeGraw was examined by the company doctor, Dr. Hanson, who released DeGraw to return to work.

Shortly after returning to work, DeGraw complained to the company nurse that working mandatory overtime was aggravating his back pain. According to DeGraw, the nurse did not assist him with a workers' compensation claim but instead instructed DeGraw to speak with his supervisor. After speaking with his supervisor, DeGraw took additional FMLA leave beginning Aug. 10, 2006. DeGraw's FMLA-protected leave expired at the end of September 2006.

Exide instructed DeGraw not to return to work until he received medical clearance. DeGraw saw several doctors, including Dr. Hanson, and underwent multiple back treatments. In late November 2006, one of DeGraw's personal physicians lifted DeGraw's work restrictions. Before permitting DeGraw to return to work, however, Exide referred him to Dr. Hanson, who refused to lift the work restrictions. Exide found no other job for DeGraw that satisfied his work restrictions, and it discharged DeGraw in January 2007.

DeGraw sued Exide, alleging that it violated the FMLA by retaliating against him for taking leave, interfering with his FMLA rights and failing to restore him to his position. He also alleged that Exide violated the KWCA by discharging him in retaliation for reporting a work-related injury for which he might file a workers' compensation claim. The district court dismissed all of DeGraw's claims against Exide, and, on appeal, the 10th Circuit affirmed.

The 10th Circuit rejected DeGraw's FMLA retaliation claim because he did not demonstrate a causal connection between his termination and the protected activity of taking FMLA leave. DeGraw only demonstrated that his termination was connected to his medical condition. A disagreement as to DeGraw's ability to perform the job of material handler does not demonstrate pretext for terminating DeGraw in retaliation for availing himself of FMLA leave, the court concluded.

The 10th Circuit also rejected DeGraw's claim that Exide violated the FMLA by failing to reinstate him when he sought to return to work in November 2006. The court explained that the FMLA permits an employer to terminate an employee who cannot return to work after the 12 weeks of leave have expired. DeGraw exhausted all of his FMLA leave by the end of September 2006; thus, DeGraw was not entitled to reinstatement.

DeGraw's claim that Exide violated his FMLA rights by forcing him to take unnecessary leave so that he exhausted his leave before late November was also rejected by the court because DeGraw failed to explain his allegation and did not provide any facts to support it.

On appeal of DeGraw's KWCA retaliation claim, the court rejected DeGraw's argument that his termination was pretext for complaining about a work-related injury because his doctor released his work restriction. The court explained that the operative question is not whether DeGraw could in fact have performed the duties of a material handler but whether Exide "honestly believed" DeGraw could not perform the job due to his medical condition. The court also rejected DeGraw's contention that Dr. Hanson had no basis to conclude that he could not perform the job duties because Dr. Hanson examined DeGraw on more than one occasion, met with him in December 2006, ordered and reviewed medical tests, and reviewed DeGraw's medical history. Finally, DeGraw failed to offer any facts to support his claim that after Exide terminated him, Exide instructed Dr. Hanson to report that DeGraw was not fit to return to work.

*DeGraw v. Exide Technologies*, 10th Cir., No. 10-3303 (Feb. 10, 2012).

**Professional Pointer:** The employer in this case wisely allowed its employee to remain on leave-of-absence status, even though the leave was not FMLA-protected leave, for an additional period of time (three-plus months) after the employee exhausted his FMLA-protected leave. This led to the court noting that the employee had exhausted his FMLA leave "long before" he was terminated.

*Katherine A. Phillips is an attorney with Malone, Thompson, Summers & Ott LLC, the Worklaw® Network member firm in Columbia, S.C.*

### Society for Human Resource Management

1800 Duke Street  
Alexandria, Virginia 22314 USA

Phone US Only: (800) 283-SHRM (7476)  
Phone International: +1 (703) 548-3440

TTY/TDD (703) 548-6999  
Fax (703) 535-6490

Questions? [Contact SHRM](#)  
Careers [Careers @ SHRM](#)

©2012 SHRM. All rights reserved.

\n\n\n"); ubertags\_renderMarkup(container, bezen.nix); \n"); ubertags\_renderMarkup(container, bezen.nix); \n\n\n"); ubertags\_renderMarkup(container, bezen.nix);