

Didi Brown, DLR's Payroll Supervisor, has fibromyalgia, which causes chronic fatigue and widespread pain. Approved for intermittent FMLA leave for the last five years for this condition, she annually submits a medical certification from her doctor, stating that her fibromyalgia is a life-long condition and that the fatigue and pain will periodically incapacitate her, causing her to miss work. The doctor certifies such episodes could occur three to four times a month and last a day or two.

During the first four years that she was approved for FMLA leave, Didi missed work three days a month on average due to her fibromyalgia. The frequency of her absences recently increased and during the first six months of 2007, she missed a total of 55 days due to her fibromyalgia.

In May, Didi began arriving after her normal start time (8 a.m.): she was late eight times, ranging from 15 to 45 minutes, but twice in excess of two hours. On June 1, Didi's manager talked to her about her tardiness. Didi told her manager that she often did not feel well in the mornings, and this caused her to be late sometimes, but she stayed late those days to make up her missed work time. Didi's manager told Didi that staying late should not become a practice because she needed to present during regular business hours to supervise her staff and she told Didi to try to get to work on time. Didi's manager did not notify Human Resources about this discussion.

In June, Didi was absent several days due to fibromyalgia and tardy seven times, four in excess of 2 hours, but she continued to make up her missed time. On June 29, Didi's manager again addressed tardiness with her. Didi apologized and told her that she was experiencing more pain caused by her fibromyalgia. The manager said that while she appreciated Didi's willingness to work into the evening to make up missed worktime, Didi was not meeting expectations of her position because she was not present to supervise her staff during significant portions of the business day. Her manager cited several errors in the last payroll processing period that she blamed on Didi's lack of staff oversight. She again told Didi that she needed to be at work by her regular 8 a.m. starting time.

On July 2, Didi brought her manager a letter from her doctor, which detailed progression of her condition and noted that the pain caused by it periodically makes it difficult for her to arrive at work on time. He asked that Didi be allowed either a flexible schedule or a 10 a.m. start time, and that she receive intermittent time off work to deal with flare-ups of her fibromyalgia. The manager forwarded this letter to Human Resources ("HR"), asking for guidance in dealing with the situation.

HR met with Didi on July 9. HR told Didi that, as a supervisor, she needed to be at work to supervise her staff during normal business hours and that a flexible schedule or a 10 a.m. start time was unworkable, because her staff began work at 8 a.m. HR warned Didi that if she could not be at work on a regular basis, she could face attendance-related discipline. HR told Didi that because she had told her manager on June 29 that her tardiness was caused by fibromyalgia, her tardiness in June – totaling two days -- would be counted as FMLA leave. HR then told her, that including these two days, she had used an accumulated 55 days of FMLA leave, that she was about to run out of her FMLA leave, and that late arrivals or absences after she ran out of FMLA could result in discipline.

In July and August, Didi was late eight more times, usually a half hour or less, twice longer than an hour; she also was absent 8 days each month due to her fibromyalgia. When she reached her fifth absence in July, DLR HR determined she had surpassed 60 FMLA leave days and notified her by letter that she was out of FMLA leave and further absenteeism could lead to discipline. On August 15, after additional absences and tardy days, Didi received a written warning advising her that her absences and tardies were jeopardizing her job and setting a poor example for her subordinates. The warning letter also identified three more payroll processing errors attributed to her inadequate supervision. On September 1, after more absences and late arrivals, Didi was terminated. DLR has received a demand letter from Didi's attorney, alleging wrongful termination.