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## **Unauthorized leave time counts as service for FMLA eligibility**

**By Lawrence Peikes**

An employee on an unauthorized leave that started before, but extended beyond, her one-year service anniversary was covered by the Family and Medical Leave Act (FMLA), and her discharge for unapproved absences was unlawful, the [4th U.S. Circuit Court of Appeals](#) has ruled.

To be eligible for FMLA leave, an employee must be employed for at least 12 months and have worked at least 1,250 hours during that 12-month period.

On June 1, 1999, BellSouth hired Kimberly Babcock as an outside advertising salesperson. In April 2000, Babcock began experiencing a variety of health problems that affected her ability to perform her job. In mid-May, Babcock consulted her physician, who recommended that she take a leave of absence from work. Babcock promptly told a BellSouth benefits case manager, Polly Hall, about her condition and that she needed to take short-term disability leave. Hall directed Babcock to have her doctor submit a certification explaining the medical reason for the leave.

Babcock started her leave on May 18. Four days later, on May 22, Babcock telephoned her supervisor and reported that her doctor had recommended six weeks of leave. On May 30, Babcock's doctor submitted the requested certification, which included his diagnosis and recommendation for six weeks leave. Babcock, believing the six-week leave had been approved, left town on May 30 and did not return home until June 9.

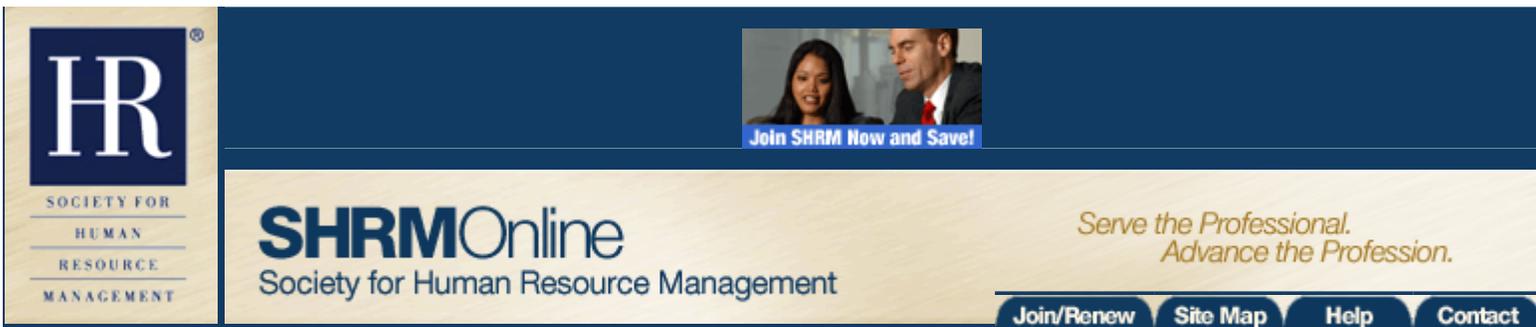
While Babcock was away, BellSouth sent two letters informing her that based on the information provided by her doctor, she had been approved for short-term disability leave only through May 27, that she was required to return to work on June 9 and that if she did not report to work on June 9 she could be subject to disciplinary action, including termination.

When Babcock returned home on June 9, she telephoned Hall and requested additional leave time. Hall advised Babcock that as of May 19, when Babcock went out on short-term disability, she had not accrued sufficient service time to be eligible for FMLA leave.

Babcock did not return to work after June 9. BellSouth terminated her employment on June 14 due to "misconduct consisting of unexcused absence." Babcock sued, claiming that the termination of her employment violated the FMLA. A jury found in her favor, and BellSouth appealed.

The sole issue on appeal was whether Babcock had been employed for at least 12 months as of the date the leave commenced. Adopting a dictionary definition of the term "leave," the 4th Circuit concluded that: "In the employment context, 'leave' means 'an authorized absence or vacation from duty or employment.'" BellSouth argued that Babcock was on a continuous leave from May 19 through June 9 and, therefore, was ineligible for FMLA benefits.

The Court rejected BellSouth's contention that Babcock was on "leave" during the period May 27 through June 9 because BellSouth had treated this absence as unauthorized, explaining that: "An employee cannot be both on leave and on an unexcused absence at the same time."

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The court of appeals held that the critical date for purposes of determining Babcock’s eligibility for FMLA leave was June 9. Between May 19 and May 27, Babcock’s absence was covered by BellSouth’s short-term disability policy and therefore authorized, even though Babcock was not yet an “eligible employee” under the FMLA. Between May 28 and June 9, Babcock remained an active employee, albeit on an unexcused absence.

Thus, while the court agreed with BellSouth that Babcock was not FMLA-eligible when her unauthorized absence began, as of June 9—when she requested additional time off—she had then been employed for over a year and had become FMLA-eligible.

[\*Babcock v. BellSouth Advertising, 4th Cir., No. 02-1791m, Oct. 28, 2003.\*](#)

**Professional Pointer:** Human resource professionals responsible for evaluating leave requests must have a clear understanding of how their companies’ leave policies relate to and coordinate with federally and state mandated leave laws, such as the FMLA. Once an employee becomes eligible for leave under a state or federal statute, an employer’s policies with respect to absenteeism, discipline and discharge may have to yield to the statutory protections. In this case, the employer had been free to take appropriate disciplinary action in response to Babcock’s unexcused absence, but instead chose to keep her on the payroll beyond the one-year anniversary that triggered FMLA eligibility. It then became liable for violating the FMLA when it thereafter fired Babcock.

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