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Decision Raises Family and Medical Leave Act Retaliation Standard: 3 Ways You Can Avoid Violations When Employees Request Leave

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In this article, the authors provide employers with tips and reminders to ensure they avoid even the appearance of retaliation against an employee who requests leave.

A federal appeals court recently raised the bar for employees who want to bring retaliation claims after they request Family and Medical Leave Act (FMLA) leave – but this does not mean that employers should let their guard down. Thanks to the decision by the U.S. Court of Appeals for the Eleventh Circuit, employees must establish that employers in Florida, Georgia, and Alabama made an adverse employment decision *because of* the leave request to prove FMLA retaliation, and not just show that it is one of several possible motivating factors.

This article provides employers across the country with helpful tips and reminders to ensure you avoid even the appearance of retaliation

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against an employee who requests leave – especially since several other courts still set a lower bar for such claims.

EMPLOYEE GETS FIRED AFTER REQUESTING FMLA LEAVE, BUT COURT SAYS SHE WAS NOT FIRED BECAUSE OF THE REQUEST

In November 2006, Doris Lapham began working at Walgreens in Florida. After working there for several years, she became a shift lead in March 2012. The shift lead position allowed Lapham to work overnight shifts and spend days caring for her son who suffered from severe forms of epilepsy. Between 2011 and 2016, Lapham – a single mother – requested and received intermittent FMLA leave to care for her son.

Before 2017, Lapham received poor to average annual performance reviews, with supervisors praising her skill with customers but noting that she had trouble completing assigned tasks, took excessive breaks, and needed coaching to improve communication with team members. In January 2017, district management placed her on a Performance Improvement Plan to address her most recent annual review that fell below expectations.

At the same time, Lapham submitted a request for intermittent FMLA leave on February 16, 2017. However, due to some delays in procuring her supervisor's signature as required by Walgreens' leave policy and an HR response that got lost in the mail, Lapham was not informed until March 31 that her request had not been processed because she failed to include official start and end dates. She accordingly submitted an updated leave request for her supervisor to sign.

In early April, while the revised FMLA request remained unsigned, her supervisor spoke with HR about Lapham's poor work performance, reporting that Lapham disregarded instruction and allegedly lied about completing tasks. During this meeting, Lapham's supervisor mentioned the pending FMLA leave request. HR approved the decision to terminate Lapham as soon as the instances of insubordination and dishonesty could be documented.

On April 7, 2017, Lapham's supervisor signed the updated FMLA request and submitted it to HR. While the request was pending, Lapham's supervisor continued to gather documentation supporting Lapham's termination, including an April 12, 2017, incident during which Lapham allegedly instructed other employees to perform tasks assigned to her. On April 13, 2017, Walgreens terminated Lapham's employment and denied her updated FMLA leave request based on her termination.

Lapham sued Walgreens for, among other things, retaliating against her in violation of the FMLA. Lapham argued that her leave request was at least a motivating factor in Walgreens' decision to terminate her, noting (1) the close timing between her leave request and termination, and (2) her supervisor mentioning the leave request in the HR discussion of Lapham's poor job performance.

However, the Eleventh Circuit's decision confirmed the Florida lower court's ruling that an employee alleging FMLA retaliation must prove that the termination occurred *because of* the leave request. It is not enough for the leave request to have merely contributed to the termination decision. In legal terms, the appeals court applied a "but for" causation standard to FMLA retaliation claims as opposed to a "motivating factor" standard.

Because Lapham could not rebut the evidence that Walgreens still would have terminated her based on documented instances of her insubordination and dishonesty, her retaliation claim failed.

THE ELEVENTH CIRCUIT'S DECISION CREATES A CIRCUIT SPLIT

Although this ruling only directly affects employers within the Eleventh Circuit – again, in Florida, Georgia, and Alabama – the proper threshold employees must meet to show FMLA retaliation differs across other federal circuits. Here, the Eleventh Circuit's decision provides greater protection for employers by establishing that the heightened causation standard applies to FMLA retaliation claims.

Specifically, this standard requires that an adverse action would not have occurred without the leave-related factor (i.e., but for the leave-related factor, the employer's adverse employment decision would not have occurred). Relevant here, Lapham could not prove that "but for" her leave request, her termination would not have occurred due to her other documented performance issues.

Yet, other circuits, such as the Sixth Circuit (comprising Kentucky, Michigan, Ohio, and Tennessee) use the "motivating factor" standard. The less stringent motivating factor standard only requires the employee prove that the leave-related factor motivated the adverse employment decision, among other factors – which Lapham attempted to argue, and the Eleventh Circuit rejected.

Thus, the Eleventh Circuit's decision creates a circuit split. Not only does that increase the possibility that the U.S. Supreme Court could one day weigh in on the issue, but it also creates different standards you must keep in mind if your locations span multiple states. The

strategies outlined below can help you avoid FMLA retaliation claims regardless of the applicable standard.

THREE STRATEGIES TO AVOID THE APPEARANCE OF RETALIATION AFTER A LEAVE REQUEST

While this ruling is a good outcome for employers in Florida, Georgia, and Alabama, it also serves as a timely reminder for all employers of best practices to avoid even the semblance of FMLA retaliation.

1. Make sure that leave request policies involve a clear and streamlined process, and you respond to requests in a timely matter. Implement a clear policy that can be easily streamlined to process requests more efficiently and avoid the appearance of a delay. For example, consider submitting leave request responses to employees via email or text message to avoid the potential for lost responses. Also, providing clear documentation to employees can eliminate potential confusion that comes with complex forms. Make the process as clear and efficient as possible.
2. Train supervisors to avoid consideration of leave requests in employee evaluations, annual reviews, or in preparation for adverse employment actions. Isolating the decisionmaker from the leave request is the surest way to avoid a potential inference that a leave request influenced an employment decision. Regardless, train and remind your supervisors that when they evaluate or coach their reports and/or make employment decisions, they avoid discussion of requested or approved FMLA leave. If the connection between the leave and the termination decision is tenuous, it will be difficult for an employee to lodge a successful retaliation claim.
3. Maintain consistency in your treatment of all employee leave requests. One way an employee might lodge a successful retaliation claim is by showing the company treated the leave request of another employee more favorably. To avoid this scenario, make sure that your leave request and approval processes treat all employees consistently, regardless of employee status or the underlying reason for the leave request. This will help mitigate any speculation of a compromised or suspicious process, even if there is a close proximity of time between the leave request and the adverse employment decision.

CONCLUSION

Properly administering FMLA leave can be challenging, but doing so will foster employee loyalty while saving your company money by reducing its liability against future potential claims. Regardless of what causation standard applies, making streamlined policies with timely participation and clear documentation, providing proper training, and applying consistent practices can help mitigate any potential FMLA retaliation exposure.

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