Liability Risks Do Not End When FMLA Leave Is Over: Retaliation under Family and Medical Leave Act
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July 19, 2004

It is well known that the Family and Medical Leave Act ("FMLA") requires employers to provide unpaid leave to employees for the birth or adoption of a child, to care for a spouse, child or parent with a serious health condition, or because of the employee's own serious health condition. What is less known is that the FMLA also prohibits an employer from discriminating or retaliating against an employee who has taken protected leave under the FMLA. Accordingly, just because an employer has granted an employee twelve weeks of leave under the FMLA does not mean that the employer's risk for liability has been eliminated. An employee who claims that as a result of taking protected FMLA leave, he or she has been subjected to an adverse employment action, such as a demotion or decrease in salary, can sue under the FMLA.

Interestingly, the statute itself does not contain any prohibition against discrimination or retaliation. Instead, the FMLA makes it unlawful to "interfere" with, "restrain" or "deny" the exercise of or attempt to exercise, rights provided by the Act. However, the U.S. Department of Labor (DOL), in its Regulations, has read this proscription against discrimination into the statute. The Regulations make it unlawful to "discriminate" against employees who have used FMLA leave or to use the taking of FMLA leave as a negative factor in hiring, promotion decisions, discipline or other employment actions. 29 C.F.R. §825.220(c).

The Second Circuit Court of Appeals (the Federal Appeals Court covering Long Island) recently issued an opinion recognizing the availability of discrimination or retaliation claims under the FMLA and describing the standard to apply in evaluating such a claim. [Potenza v. City of New York, No. 01-9351 (2d Cir. April 23, 2004)].

The Second Circuit held that the same standard used for evaluating claims of discrimination under the Title VII claims should apply. In other words, a Plaintiff must prove that: (1) he exercised rights protected under the FMLA; (2) he was qualified for the position; (3) he suffered an adverse employment action; and, (4) the adverse employment action occurred under circumstances giving rise to an inference of discrimination.

In Potenza, the Plaintiff alleged that he was removed from his position because he had taken a one-month medical leave to have surgery; the employer claimed he was removed for performance reasons and efficiency. In finding for the Defendant, the District Court cited the two month difference between the Plaintiff's FMLA leave and his removal as evidence against discrimination. In affirming, the Second Circuit held that while the delay alone was not sufficient to rebut a claim of retaliation, other facts, such as another employee who did not request an FMLA leave and had been removed at the same time was enough to outweigh any inference of discrimination.

Editor's Note: While the Court ultimately ruled in favor of the Defendant, this decision is important because it now establishes that discrimination claims under the FMLA will be analyzed in the same way as those under Title VII. Accordingly, the same precautions that are taken to avoid liability under Title VII (e.g., ensuring that similarly situated employee are treated the same) apply equally to claims under the FMLA. The case further illustrates that even if an employee receives all the leave to which he or she is entitled under the FMLA, the employee may still face liability for discrimination and
retaliation claims.

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