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EMPLOYER LAW BLOG

FMLA Leave: What is Retaliation?

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Employers are often faced with difficult decisions when a poorly performing employee takes FMLA leave. Any action against the employee following the leave may be closely scrutinized and result in a claim for retaliation. A recent 7th Circuit case provides some guidance on what is, and is not, a retaliatory act.

The employee failed to make a direct case of retaliation

In order to make a prima facie case of retaliation under the direct method, the employee must show three things:

1. A statutorily protected activity (such as taking leave);
2. A materially adverse action taken by the employer; and
3. A causal connection between the two.

The 7th Circuit recently explored an FMLA retaliation claim against Wal-Mart and considered the issue of what is (and is not) a "materially adverse action" against an employee. A former employee argued that Wal-Mart took four "materially adverse actions" against her in retaliation for her taking FMLA leave:

1. A negative performance review
2. Placing her on a performance improvement plan
3. Assigning her to the overnight shift
4. Terminating her employment

The Court found that the first two actions, the performance review and the PIP, were not materially adverse actions. The Court noted that negative performance evaluations alone are not adverse employment actions, citing *Haywood v. Lucent Techs., Inc.,* 323 F.3d 524 (7th Cir. 2003). Likewise, the Court observed that implementation of a PIP is not a materially adverse action, citing *Cole v. Illinois,* 562 F.3d 812 (7th Cir. 2009).

The Court found the assignment of the employee to the night shift was also not a materially adverse action. Here the Court applied what might be called the “known vulnerability” test. Where there is no evidence the employer sought to exploit a “known vulnerability” by altering an employee’s work schedule upon return from FMLA leave, a schedule change is not a materially adverse action.

An example of a “known vulnerability” was found in *Washington v. Ill. Dept. of Revenue,* 420 F.3d 658 (7th Cir. 2005). There the employer knew the employee had previously used flex time to care for her disabled son.

In this case, the employee complained the night shift was more physically demanding and she had informed her supervisor of ongoing limitations after her return to work. But the Court noted she had not sought any special accommodations and her doctor cleared her to work without restrictions.

The parties agreed the termination was a materially adverse action, but the Court found there was no causal connection between the leave and the termination. The employee had a history of performance issues that existed before her FMLA leave. Before her leave she had already received poor performance evaluations and been placed on a PIP. Comments about her performance were made by her supervisors both before and after her FMLA leave.

The indirect method also failed

The employee also tried to make her retaliation claim by the indirect method. This method required her to show she was meeting the employer’s legitimate expectations at the time she was terminated and was treated less favorably than employees who did not take FMLA leave.

The Court found she did not show she was meeting the employer’s expectations at the time she was terminated. Despite a comment by a supervisor that she was “doing great” and “doing fine”, the Court found the overwhelming evidence demonstrated that she was not meeting Wal-Mart’s expectations.

While this case provides some guidance, handling a poorly performing employee who has taken FMLA leave requires a fact-intensive analysis and careful examination of the documents pertaining to the employee.

For more information on the Family Medical Leave Act, see our full archive of FMLA blog entries.

By Courtney Cox

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Langenbach v. Wal-Mart Stores, Inc., No. 14-1022 (7th Cir., Aug. 4, 2014)