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D.C. Circuit Reinstates FMLA Claim Even Though Plaintiff's Leave Request Was Granted

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Client service is paramount in the hospitality industry, and frequent or extended leaves of absences by employees may make providing the same level of consistent service difficult. But employers should take heed of the recent decision by the ***District of Columbia Circuit Court of Appeals*** when considering employee requests for leave under the ***Family and Medical Leave Act***. In ***Gordon v United States Capitol Police***, No. 13-5072 (D.C. Cir. Feb. 20, 2015), the D.C. Circuit held that an employer who discourages an employee from taking FMLA leave may be liable for an interference claim, even if that discouragement was "ineffective." In other words, don't bully, discourage, or make employees jump through unnecessary hoops if they ask for FMLA leave, because those employees may still have a viable lawsuit for FMLA interference despite having received the requested leave.

Judy Gordon, an officer with the Capitol Police, was granted FMLA leave to address intermittent periods of severe and incapacitating depression. Before her leave commenced, Gordon's superiors ordered her to submit to a "fitness for duty examination" because of her FMLA request. While waiting for the examination, Gordon was reassigned to administrative duties, resulting in a loss of $900 (the equivalent of three days' pay). Gordon passed the examination, was reinstated to her prior post, and took the requested FMLA leave and returned without incident. Nonetheless, Gordon sued, asserting claims of interference and retaliation under the FMLA, and alleging that the presence of the "fitness for duty examination" on her permanent record would be detrimental to her prospects for pay increases, promotions, and transfers.

Addressing an issue of first impression for the D.C. Circuit, the court considered whether Gordon could proceed with her FMLA interference claim even though she was granted and ultimately took the requested leave. Drawing an analogy between the interference provisions of the FMLA and the NLRA – which courts have interpreted to permit NLRA Section 8 claims based on actions that have a "reasonable tendency" to interfere with employees' rights, regardless of whether they actual did – the court held that "an employer action with a reasonable tendency" to interfere with an FMLA right may support a valid interference claim "even where the action fails to actually prevent such exercise or attempt."

Here, the D.C. Circuit reinstated the inference claim because it found that subjecting Gordon to a

fitness for duty examination, which resulted in her loss of $900 and potentially impacted her future career prospects, would have a “reasonable tendency” to interfere with an employee’s exercise of FMLA rights. The court also appeared to be influenced by allegations in the complaint that upper-managers frowned upon FMLA leave generally and were looking for ways to prevent Gordon from taking leave.

In its decision, the court set a low threshold for what constitutes an adverse action sufficient to support an FMLA retaliation claim. One of the elements of a *prima facie* case of FMLA retaliation is a showing that the plaintiff was adversely affected by an employment decision. The court refused to decide whether that element requires a showing of “material adversity” – as articulated for Title VII claims in *Burlington Northern & Santa Fe Railway Co. v. White*, 548 U.S. 53, 68-70 (2006) – or something less, such as *any* monetary loss, no matter how small – as suggested in *Ragsdale v. Wolverine World Wide, Inc.*, 535 U.S. 81 (2002). Rather, the court concluded that the loss of $900, the equivalent of three days’ pay, was more than *de minimis* and met the higher “material adversity” threshold, allowing the FMLA retaliation claim to proceed.

This decision is a reminder to employers, particularly those with operations in Washington, DC, to tread carefully when processing requests for leave under the FMLA. Although leaves of absence can be disruptive to the workforce, and employers are within their rights to make certain inquiries into the need for leave, the mere fact that FMLA leave is ultimately granted will not insulate an employer from potential liability for conduct that has the potential to dissuade an employee from requesting leave. To avoid unnecessary litigation, employers should instruct their leave administrators and supervisors to refrain from openly questioning or criticizing an employee’s request for leave and from requiring additional certifications beyond those contemplated by the law.

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