

Retaliation Claims Difficult to Defend

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A recent judgment in the United States District Court in *Connecticut* of over Five Hundred Thousand Dollars (\$502,402.05) illustrates the difficulties involved in defending retaliation claims. ***Summerlin v. Almost Family, Inc.***, 3:12-cv-00007-WWE. The judgment included liquidated (double) damages under the ***FMLA***, interest, costs and attorneys' fees.

BACKGROUND

Summerlin was a registered nurse. She received her nursing degree in 1977 and had over thirty years of professional nursing experience. Almost Family hired her in October of 2006 as a per diem nurse. In 2009, she accepted a full-time position with Almost Family as a registered nurse Behavioral Health Case Manager. She was responsible for, among other things, coordinating client care, completing documentation and recertifications, coordinating admissions to home care services, discharges, and transfers. She was assigned to manage clients located in Danbury, Brookfield, New Fairfield and Newtown, Connecticut.

In or about February of 2010, Summerlin fell on ice outside of a patient's home, injuring her hip. In April of 2010, she aggravated her injury during a client-visit while picking up a leaded lockbox used to store medications. On or about April 8, 2010, she took leave from work and sought medical advice. On April 16, 2010, Almost Family sent Summerlin notice regarding the designation of her leave under the FMLA. She also received workers' compensation benefits from April 8, 2010 through March 8, 2011. She was not able to return to work until February of 2011, when she was released to work on a light duty basis. Summerlin was released to return to work without restriction on March 8, 2011.

REFUSAL TO REHIRE FULL-TIME

Summerlin's job as a Behavioral Health Care Manager had been eliminated in a re-organization in August 2010 while she was out on leave. She had earned \$111,531.43 during her last full year of full-time employment. In anticipation of returning to work, she applied for three positions in February 2011: 1) HHA Manager; 2) Behavioral Health Clinical Manager; and 3) Patient Care Liaison. She was not hired into any of these positions. On March 26, 2011, Almost Family rehired Summerlin as a per diem nurse. Later in 2011, Summerlin accepted work elsewhere and left Almost Family. Nonetheless, in December 2011, she applied for two more positions at Almost Family: as a Psych RN and as a Home Health Care RN. Almost Family hired other applicants for four of the positions and did not fill

the fifth.

SUMMARY JUDGMENT DENIED

Summerlin filed suit on January 4, 2012, claiming that Almost Family refused to rehire her into a fulltime position in retaliation for seeking FMLA leave and filing a workers' compensation claim. After discovery, Almost Family filed a motion for summary judgment, asserting that Summerlin was not qualified for the full-time positions for which she applied and that she failed to produce any evidence of her qualifications for the positions. On March 17, 2014, four years after Summerlin took her leave of absence and two years after she filed suit, Judge Eginton denied Almost Family's motion for summary judgment, finding multiple issues of fact for the jury to decide at trial. In particular, Judge Eginton noted that "at deposition, defendant's hiring manager, Kelly Federle, was unable to explain why plaintiff was not selected for four different full-time nursing positions for which plaintiff applied. Indeed, Ms. Federle indicated that she may not have even considered plaintiff's applications:

Q: Why would you hire somebody else instead of a former employee?

A: Because I hired somebody else. And it was my decision to make.

Q: And do you recall why you exercised your discretion in that manner?

A: I don't recall. Like I said, I don't remember who I hired in her place or if I even saw [plaintiff's application]. I didn't go into the hiring portal every day, so I may not have seen that for – in fact, there's no proof I ever did see it, quite frankly."

VERDICT AND POST-TRIAL MOTIONS

The case was tried to the jury in April 2015 and the jury returned a Plaintiff's verdict on the FMLA retaliation count in the amount of \$400,000 and a verdict of \$1.00 on the workers' compensation retaliation count. Plaintiff's counsel then moved for a doubling of the award under the liquidated damages provision of the FMLA, for prejudgment and post-judgment interest, attorneys' fees and costs. Defendant moved for Judgment as a Matter of Law in its favor, and for remittitur or for a new trial. The Court reduced the amount of the jury's award to \$195,507.19 because the jury had not taken into account Summerlin's earnings between the time she was released to work fulltime at Almost Family and the time of trial, but then doubled that amount as liquidated damages. The Court then awarded interest, costs (\$1,536.67) and plaintiff's attorneys' fees (\$109,850), for a total judgment of \$502,402.05.

As the Court pointed out, an employer is liable for liquidated damages under the FMLA unless it proves that the violation "was in good faith and that the employer had reasonable grounds for believing that the act or omission was not in violation of the Act", in which case, "the court may reduce the amount of liability." Here, Almost Family argued that it had complied with the leave requirements under the Act and that the decision not to rehire Summerlin was completely separate from the decision to grant her FMLA leave. The Court disagreed, stating: "Plaintiff never claimed that her use of FMLA leave was obstructed" and that Almost Family's "general efforts to comply with the FMLA do not demonstrate that its violation of the Act was made in good faith." In fact, the Court found that the jury's verdict of retaliation effectively precluded the Court from finding that Almost Family had acted "in good faith" in rejecting Summerlin for four fulltime positions.

TAKE-AWAYS

1. Be aware of the risks of a retaliation claim when an employee exercises rights under a federal or state statute – even when those rights are not interfered with.
2. Make sure that you have objectively defensible reasons for refusing to rehire a former employee – or reassignment of a current employee. If you hired the employee in the first place, the Judge and the jury may well be justified in assuming that the former employee is qualified, even if the position under consideration is somewhat different. Document the reasons why you chose another candidate. Do not assume that you won't have to explain your reasons later. You don't want to give the answer that Almost Family gave (quoted above).
3. Step away from management's (likely legitimate) justifications for its actions and consider the "simple story" that the jury will hear. In this case, the jury learned of a nurse with over thirty years of experience, including three years as a per diem nurse and two years as a care manager with Almost Family, who was not offered fulltime employment when she returned from FMLA leave. Based on these unadorned and undisputed facts, can you see why Almost Family faced significant risk of losing on the retaliation claim?
4. Know your exposure under the applicable statutes from the outset as it will inform your risk assessment. Here, Plaintiff's high earnings (low six figures) and statutory claims for double damages, interest, attorneys' fees and costs – coupled with the cost of defense – made trying the case to verdict a risky proposition.

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