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EMPLOYER LAW BLOG

FMLA: Retaliation and Interference – Two Paths

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The FMLA provides certain protections to employees. It is important that employers familiarize themselves with these protections. Employees claiming FMLA leave have two separate potential paths of recovery against employers – retaliation and interference.

Retaliation

Employees are protected against retaliation for:

- Taking leave under the FMLA;
- Opposing employment practices that violate the FMLA;
- Giving information, testifying, preparing to testify or filing a charge or claim about an FMLA violation. See 29 CFR §2615.

These are considered "protected activities" under the FMLA.

What are the elements of a claim of retaliation?

The elements of a retaliation claim are:

1. The employee engaged in a protected activity;
2. The employer took a "materially adverse" employment action against the employee. This means an action that is likely to dissuade a reasonable employee from engaging in FMLA-protected activity.
3. The employee's protected activity caused the employer to take the adverse action.

How does an employee prove these elements?

There are two ways for an employee to make a case of retaliation:

1. using direct proof, or
2. using an indirect method of proof.

The Direct Method

An employee using the direct proof method of proof has to present evidence that the employer to materially adverse action against him or her on account of his protected activity.
If the employee makes this showing, the employer may show that it would have taken the same action even if it had no retaliatory motive. An employer may also show it did not know about the protected activity so there can be no connection between the employee's protected activity (e.g. opposing an employment practice) and the action it took against the employee.

The Indirect Method

An employee using the indirect method of proof has to show that after engaging in the protected activity he or she was treated less favorably than other similarly situated employees who did not engage in protected activity, even though the employee was performing his or her job in a satisfactory manner. If the employee cannot point to a similarly situated employee, the employee is limited to proof by the direct proof method.

Circumstantial Evidence

Circumstantial evidence may be used to help the employee prove his or her case. Such circumstantial evidence includes:

- Suspicious timing
- Ambiguous statements
- Behavior toward the employee
- Comments to other employees

What are the employer's defenses to a retaliation claim?

- The employee has not established each element of his claim
- The employee's position was eliminated during the FMLA leave
- The employee would have been laid off due to reduction in force or financial issues, regardless of FMLA leave
- The employer honestly believed the employee misused FMLA leave. [See, *Kariotis v. Navistar Int'l Transp. Corp.*, 131 F.3d 672, 680-81 (7th Cir. 1997)
- The employee fraudulently obtained the FMLA leave

- The employee failed to provide a fitness-for-duty certificate to return to work
- The employee was hired for a specific duration or a particular project which has been completed.

Interference

In addition, it is unlawful for an employer to "interfere with, restrain, or deny the exercise of or the attempt to exercise, any right" provided by the FMLA. 29 CFR §2615 (a)(1). This is an entirely separate claim from a retaliation claim.

In order to make a claim for interference, the employee only has to show the employer denied him or her of an FMLA entitlement. No showing of ill will is required.

What is interference?

- Refusing to authorize FMLA leave
- Discouraging the employee from taking leave

What are the elements the employee has to prove in an interference claim?

The elements of an interference claim are:

1. The employee was eligible for FMLA protections
2. The employer was covered by the FMLA
3. The employee was entitled to leave under the FMLA
4. The employee provided sufficient notice of his or her intent to take leave
5. The employer denied the employee FMLA benefits to which he or she was entitled

What is sufficient notice?

An employee does not have to expressly mention the FMLA in his leave request. *Burnett,* above. The employee may be completely ignorant of the benefits conferred by the FMLA.

The notice is adequate so long as the employee provides enough information to show he likely has an FMLA-qualifying condition. The employee's duty is merely to place the employer on notice of a probable basis for FMLA leave, that is, that the FMLA may apply to the leave.

However, in *Burnett,* the Court noted that "in the usual case, and employee's bare assertion that he is 'sick' is insufficient." On the other hand, "an employee may be excused from giving notice where his medical condition (e.g. clinical depression) prevents him from communicating the nature of his illness and the resulting need for medical leave. Some conditions present an obvious need for medical leave (e.g. a broken arm).

You have notice, now what?

Once it receives notice of the probable need for medical leave, the employer has a duty to conduct further investigation and inquiry to determine whether the proposed leave in fact qualifies as FMLA leave. In other words, the employer who has notice has to request enough additional information as may be necessary to the confirm the employee's entitlement to such leave.

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

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Case Cite: *Burnett v. LFW, Inc.,* 472 F.3d 471 (7th Cir. 2006)