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But-For, or Not But-For: That Is the Question for FMLA Retaliation Claims

Labor & Employment Workforce Watch

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For a retaliation claim under the Family and Medical Leave Act ("FMLA"), must an employee show that an adverse employment action would not have happened *but-for* (i.e., it happened only because of) the employee's request for FMLA leave or other protected activity? Or, does an employee have to show only that his or her request for FMLA leave or other protected activity was a *motivating factor* for the adverse employment action? The answer now involves a split among the U.S. Circuit Courts of Appeals.

The Two Standards

The less-demanding *motivating factor* standard is satisfied by evidence that the employee's request for FMLA leave (or other protected activity under the FMLA) was a motivating factor for an adverse employment action, even though other factors also motivated the adverse action.

In contrast, the more-demanding *but-for* standard is satisfied only by evidence that an adverse employment action would not have happened *but-for* the protected activity.

Circuit Split

The Eleventh Circuit recently adopted the *but-for* standard in *Lapham v. Walgreen Co.* This creates a split among the United States Courts of Appeals. The Second, Third, and Ninth Circuits previously adopted the *motivating factor* standard, whereas the Sixth Circuit has waffled on whether the *but-for* standard or *motivating factor* standard is appropriate.

The *Lapham* Decision

In *Lapham*, Walgreens terminated an employee who took intermittent FMLA leave following a history of performance issues, insubordination, and dishonesty. The employee sued Walgreens, alleging interference with her FMLA rights and retaliation. The employee maintained that her request to take FMLA leave was a motivating factor for her termination, citing decisions from the Second, Third, Sixth, and Ninth Circuits for her argument that the motivating factor standard should apply.

The district court disagreed and ruled that the *but-for* standard is the appropriate standard for FMLA retaliation claims.

On appeal, the Eleventh Circuit affirmed the district court's ruling that the employee had to show her termination occurred *because of* the request for FMLA leave. The Eleventh Circuit relied on the Supreme Court's analysis in *University of Texas Southwestern Medical Center v. Nassar*, in which the Court determined that Title VII retaliation claims are subject to *but-for* causation. The Eleventh Circuit concluded that because Title VII's discrimination provision explicitly states motivating factor causation as its standard, Congress would have included the same language in the retaliation provisions of Title VII and FMLA had it intended for motivating factor causation to be the standard. Since the retaliation provisions of Title VII and FMLA use "because [of]" language and no other causation language, the Eleventh Circuit reasoned that Congress intended the "but-for" standard to apply and disregarded the findings of the Second, Third, Sixth, and Ninth Circuits.

Implications for Employers

The *Lapham* court's application of the *but-for* standard is good news for employers in the Eleventh Circuit. Employees must meet a higher standard to prevail on FMLA retaliation claims. To prove the but-for standard, it is not enough that a request for FMLA leave (or any other protected activity under the FMLA) motivated any adverse employment action. Rather, employees must show their protected activity was the cause of the adverse employment action, and *but-for* the protected activity, the employee would not have faced the adverse employment action.

However, the *but-for* standard is not universal. Thus, all employers—particularly those in circuits where courts have found the motivating factor standard is proper—may want to take additional proactive measures (i.e., clear leave policies, updated job descriptions, and documentation of employee misconduct or other factors involved in these decisions) before taking any adverse employment action against an employee who has engaged in protected activity under the FMLA. The more employers do to demonstrate thorough training, policies, or other documentation regarding protected activity under the FMLA, and that adverse employment actions regarding persons who engaged in protected activity under the FMLA were taken for other reasons, the more easily employers will be able to defeat such FMLA retaliation claims.

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