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EMPLOYMENT LAW

FMLA Harassment Not Actionable Without Missed Leave

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Special to the Legal

It is undoubtedly a bad idea for a manager to harass an employee each time she takes leave under the Family and Medical Leave Act (FMLA). But if the employee takes leave each time necessary, such alleged harassment, even if it is perceived as discouraging additional leave, is not illegal—as discussed in the recent decision, *Hernandez v. Temple University Hospital*, No. 17-4381 (E.D. Pa. Jan. 8, 2019).

EMPLOYEE'S DAUGHTER WITH ASTHMA

Nancy Hernandez was a medical secretary in the cardiology department at Temple University Hospital from July 2008 until her termination in September 2016. Throughout her employment, Hernandez requested, and Temple approved, numerous periods of intermittent or continuous leave to care for her daughter, who suffered from severe asthma. In February 2016, Temple approved Hernandez's request for intermittent leave of two to three absences per month with each episode lasting no more than four hours.

In July 2016, Hernandez submitted a request for more frequent leave for her daughter's medical examinations. Hernandez claimed that her supervisor, Valencia Church, falsely told her



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that she needed to recertify her eligibility for FMLA leave at the time. Nevertheless, the additional leave was granted.

SUPERVISOR 'DISCOURAGES' FMLA USAGE

In addition to providing Hernandez with erroneous, if not intentionally false, information (since the FMLA permits an employer to request recertification every six months—not the five allegedly required by Church), Hernandez alleged that Church harassed her for taking leave under the act. Hernandez claimed that Church repeatedly questioned the validity of her daughter's illness and would demand a doctor's note each time she was absent. More generally, Hernandez testified that Church was "hostile" and would give her a "hard

time" each time she took FMLA leave and that Church gave her a larger workload when she returned from leave.

Hernandez brought suit, asserting that Church's actions violated the FMLA by "interfering" with her attempts to exercise her rights. Specifically, the act provides that "it shall be unlawful for any employer to interfere with, restrain or deny the exercise of the attempt to exercise any right provided under the FMLA," 29 U.S.C. Section 2615(a) (1). Moreover, the Department of Labor's regulations provide that "interfering with the exercise of an employee's rights would include, for example, not only refusing to authorize FMLA leave, but discouraging an employee from using such leave." Hernandez argued that Church's alleged harassment "discouraged" her from exercising her rights under the act because she was "stressed" every time she took leave and was "discouraged about taking her allowed leave."

EMPLOYEE TAKES ALL NEEDED LEAVE

Critically, however, Hernandez testified that despite Church's actions, she took leave whenever her daughter needed her. And because she did so, Hernandez was unable to satisfy the element of the prima facie case requiring evidence that the plaintiff

“was denied benefits to which he or she was entitled under the FMLA.” Specifically, the court found that “the U.S. Court of Appeals for the Third Circuit has unequivocally stated that for an interference claim to be viable, the plaintiff must show that FMLA rights were actually withheld” (quoting *Ross v. Gilhuly*, 755 F.3d 185, 191-92 (3d Cir. 2014)). The court continued: “An employee who obtains all of the FMLA benefits to which he or she is entitled by taking leave and then being reinstated to the same position from which he or she left cannot satisfy the fifth prong of the interference analysis and thus he or she fails to make a prima facie showing of interference.”

The court noted that while Church’s conduct could “be inferred to have discouraged Hernandez from taking leave, the fact is that she testified that it did not do so and that she took leave as needed despite the alleged conduct.” Since “Hernandez cannot show that Church’s conduct caused her to take any less leave time than she otherwise would have ... her claim that Church interfered with her FMLA rights must fail.”

ERRONEOUS INFORMATION NOT ENOUGH

Similarly, the fact that Church allegedly told Hernandez that she needed to recertify her entitlement to leave after five months, rather than six, did not state a viable claim for interference. In accordance with the U.S. Supreme Court’s decision in *Ragsdale v. Wolverine World Wide*, 535 U.S. 81 (2002), an employer’s technical violations of the act will not support a cause of action without evidence that the violation caused the plaintiff actual harm. In this case, it was undisputed that Temple

granted Hernandez the leave she requested in the recertification (which significantly expanded her FMLA rights), thereby undermining any viable claim.

NO RETALIATION

Although of less legal significance, Hernandez also claimed that Temple violated the FMLA when it terminated her employment, allegedly in retaliation for exercising her FMLA rights. Hernandez was terminated after it was discovered that she had violated Temple’s HIPAA policy by viewing the medical records of a patient in the OB-GYN department—when Hernandez worked in cardiology.

Employers should consider reiterating in managerial training that FMLA discussions should be directed exclusively to human resources and that they should refrain from any discussion of leave.

The patient, who was allegedly harassing Hernandez, complained to the OB-GYN department and the investigation was conducted without the involvement of Church, the only person in the cardiology department to allegedly demonstrate hostility to Hernandez’s FMLA. When the computer records showed that Hernandez had, in fact, viewed the patient’s records, the hospital’s chief compliance officer, in consultation with Temple’s counsel and the chief operating officer, made the decision to terminate.

While the court found that Hernandez was unable to establish the “causal connection” element of her prima facie case, it also rejected her argument that she could establish pretext based upon the hospital’s failure to interview her during its investigation. The court found that given the clear violation of the hospital’s HIPAA policies, which provide for discipline up to and including termination, “whether the hospital would have been wiser to obtain any explanation that Hernandez might have offered is not the point.”

LEAVE FMLA TO THE HR DEPARTMENT

While summary judgment on the FMLA retaliation claim seems clear-cut, it appears that the hospital “dodged a bullet” on Hernandez’s interference claim. Had Hernandez testified that she delayed leaving work to attend to her daughter, or that she had asked a relative to take her daughter to the physician because she feared retribution from Church, the allegations, vague as they were, may well have supported a viable claim. In this light, employers should consider reiterating in managerial training that FMLA discussions should be directed exclusively to human resources and that they should refrain from any discussion of leave—regardless of any perceived impact on the department overall. •