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EMPLOYMENT LAW

Court Eases Burden on Employees in FMLA Retaliation Claims

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Special to the Legal

Employers and their counsel face the spectre of Family and Medical Leave Act (FMLA) retaliation on a seemingly daily basis. Managers are often frustrated by an employee's absence and may find that the department continues to function successfully during the employee's absence. The employee's return (or continuation of the leave if intermittent) may not go smoothly and whether his employment continues, an FMLA retaliation claim may ensue. In *Egan v. Delaware River Port Authority*, No. 16-1471, 2017 U.S. App. LEXIS 4993 (3rd Cir. March 21), the U.S. Court of Appeals for the Third Circuit affirmed the existence of a cause of action for FMLA retaliation and eased the burden on employees by allowing claims to proceed on a "mixed-motive" theory without "direct evidence" of discrimination for employees to prevail in subsequent litigation.

HEADACHES INCREASED AND ASSIGNMENT ENDS

Joseph Egan worked for the Port Authority as a projects manager for special projects from July 2008 to February 2012. At that time, he was transferred to a "special assignment" in the engineering department. He



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suffered from migraine headaches, the frequency of which increased "almost instantaneously" with his transfer to the engineering department. Egan began an intermittent FMLA leave in April 2012.

In July 2012, it was discovered that Egan had been reporting only the "approximate" number of hours that he was working, rather than the "actual" number of hours. The Port Authority presented evidence that this created a "hardship" in the workplace. There was testimony at trial that Egan's supervisor appeared to be angry at not being notified when Egan was leaving the workplace. On the other hand, Egan testified directly that his supervisor never said anything to him that

indicated specifically that he was not happy about his usage of FMLA leave. In October 2012, Egan was terminated, as his "temporary reassignment" to the engineering department had been "deemed completed."

VERDICT FOR PORT AUTHORITY

Egan brought suit claiming violations of the Age Discrimination in Employment Act (ADEA), Americans with Disabilities Act (ADA) and the FMLA. Specifically, Egan claimed

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that he was retaliated against for having taken FMLA leave from April to October. The jury returned a verdict for the Port Authority and Egan appealed, claiming that the court had committed reversible error by refusing to give a "mixed-motive" jury instruction in connection with his FMLA retaliation claim.

FMLA RETALIATION CLAIM VIABLE

The court initially noted that an FMLA-retaliation claim is explicitly set forth in a Department of Labor (DOL) regulation. As such, the court addressed whether the regulation in question is entitled to so-called *Chevron* deference under *Chevron v. National Resources Defense Council*, 467 U.S. 837 (1984).

The court first considered that although the FMLA could be interpreted to prohibit retaliation, it does not explicitly do so. Although the statute does not specifically provide for a retaliation claim, the act does make it “unlawful for any employer to interfere with ... the exercise of ... any right provided.” The court noted that “interference could ... occur if an employee fears that he or she will be retaliated against for taking FMLA leave.”

The second step in the *Chevron* deference analysis is whether the regulatory pronouncement “is based on a permissible construction of the statute.” The court found that the DOL’s interpretation is consistent with the purposes of the FMLA. As the Ninth Circuit observed in an earlier decision “the established understanding at the time the FMLA was enacted was that employer actions that deter employees’ participation in protected activities constitute interference or restraint with the employees’ exercise of their rights ... and attaching negative consequences to the exercise and protected rights surely ‘tends to chill’ an employee’s willingness to exercise those rights.”

Having found that the FMLA does, in fact, prohibit retaliation, the court moved to the question of whether such claims could be analyzed under a mixed-motive theory. Under the “mixed-motive” analysis, if an employee can show that the FMLA was “a negative factor” in the ultimate retaliatory conduct, the burden shifts to the employer to prove that the decision or action would have been the same absent consideration of the FMLA.

‘NEGATIVE FACTOR’ TRIGGERS MIXED-MOTIVE CLAIM

The court observed that “a plaintiff pursuing a mixed-motive theory must show that exercise of FMLA rights was ‘a negative factor in the employer’s employment decision.’ In contrast, a plaintiff who proceeds to trial ‘under a pretext theory’ must prove that a protected characteristic or the exercise of a protected right was ‘a determinative factor’ and therefore had a determinative effect on the decision.” A “determinative factor” is one that, in its absence, “the adverse action would not have occurred.”

The court found that while under the ADEA and Title VII, Congress had specifically provided that “a plaintiff must prove ‘but for’ causation between the adverse employment action and the protected characteristic,” the FMLA does not provide a causation standard for retaliation claims. Again, the Department of Labor’s regulation prohibits an employer from using “the taking of FMLA leave as a negative factor in employment actions.” The court concluded that “the DOL’s use of a mixed-motive framework is not inconsistent with Supreme Court precedent and the regulation’s mixed motive approach is a permissible construction of the statute.” As such, it was entitled to *Chevron* deference.

The court then considered the type of evidence was necessary in order to warrant a mixed-motive instruction in an FMLA retaliation claim.

The district court had denied Egan’s request for a mixed-motive instruction on the grounds that there was no “direct evidence” of discrimination (such as a direct statement linking the termination to Egan’s use of FMLA). The court found this to be reversible error based upon the Supreme Court’s decision in *Desert Palace v. Costa*, 539 U.S. 90 (2003), which held that “direct evidence is not required for a court to

deliver a mixed-motive jury instruction for Title VII claims.” To the contrary, Title VII requires only that a plaintiff “demonstrate that an employer used a forbidden consideration with respect to ‘any employment practice.’” The Third Circuit found that in considering Egan’s request for a mixed-motive instruction, the court “should have determined whether there was evidence from which a reasonable jury could conclude that the Port Authority had legitimate and illegitimate reasons for its employment decision and that Egan’s use of FMLA leave was a negative factor in the employment decision.” The court noted that the error was not harmless because “the difference between ‘but-for’ and ‘mixed-motive’ instruction goes to the central issue before the jury: Why was Egan fired?”

PRACTICAL EFFECT

The impact of allowing for the possibility of mixed-motive cases in FMLA retaliation claims could be considerable. The difficulty for employers, as noted, is that managers will often express frustration at an employee’s absence from the workplace, whether it is permitted under the FMLA or not. It is now possible under *Egan* that such frustration could be evidence that the FMLA was “a negative factor” in an ultimate employment decision, which could, in turn, require the employer to carry the burden of proving that it would have come to the same decision, regardless of its consideration of his FMLA leave. •