BARNES & THORNBURG LLP

ALERTS

Sixth Circuit Expands Retaliation Protections For Employees Potentially Entitled To Leave Under The FMLA

February 3, 2023

Highlights

An employee does not have to be entitled to leave under the Family and Medical Leave Act (FMLA) to be protected from retaliation

In the event of a dispute, an employer has an affirmative obligation to gather information to determine whether the leave qualifies under the FMLA

An employee may be entitled to retaliation protection under the FMLA if their request for leave is based on prior communications and the circumstances surrounding their request

The Sixth Circuit Court of Appeals recently cemented expansive protections for employees asking for a leave of absence even where the leave may not qualify for protection under the Family Medical Leave Act (FMLA).

In *Polina Milman v. Fieger & Fieger P.C. et al.*, the Sixth Circuit made it clear that an employee does not have to make a specific request for FMLA leave, or even be entitled to take FMLA leave, to qualify for

RELATED PEOPLE

Aaron Vance
Associate
Indianapolis

P 317-261-7956
F 317-231-7433
Aaron.Vance@btlaw.com

Grant T. Pecor
Partner
Grand Rapids, Southeast Michigan, Chicago

P 616-742-3911
F 616-742-3999
GPecor@btlaw.com

RELATED PRACTICE AREAS

Labor and Employment

protection from retaliation under the act, as long as they make a request that raises the question of potential entitlement to FMLA leave.

In the early days of the pandemic, an attorney with Fieger and Fieger P.C. requested to work remotely. In addition to this request, she expressed concerns about working in person as her son, who was beginning to exhibit symptoms of COVID-19, was vulnerable to infection due to a recent bout of respiratory syncytial virus (RSV). The firm's owner denied her request, and she contacted the firm's human resources department.

The attorney then offered to take unpaid leave (but did not explicitly request FMLA leave) and human resources instead offered that she work from home for a few days. When she did not return to the office, her employment was terminated. She later sued alleging FMLA retaliation in addition to various claims arising under Michigan state law.

The U.S. District Court for the Eastern District of Michigan dismissed the case, holding that the attorney was required to show "she was entitled to FMLA leave" to sustain an FMLA retaliation claim – which she failed to do because she had not established she would be caring for someone with a "serious medical condition." However, on appeal, the Circuit Court disagreed and reversed the District Court's ruling. Specifically, the court held that under the FMLA, an employee does not have to make a specific request for leave to qualify for protection from retaliation, as long as they make a request that raises the question of possible entitlement to FMLA leave (even if they are not actually eligible). According to the court, the FMLA does not require employees to know "presumptively whether their leave requests would fall within the scope of statutory entitlement."

Instead, this burden falls upon the employer. In this case the court went on to affirm an employer's obligation to work with a requesting employee to gather information necessary to determine whether the requested leave qualifies under the FMLA.

The court noted that the firm seemingly recognized her need for accommodation to care for her son but failed to take any further action concerning whether she was entitled to leave under the FMLA. In failing to do so and simply electing to terminate her employment, the attorney had an actionable claim for retaliation.

This decision makes it clear that an employee requesting a leave of absence due to their, or a family member's, medical condition might potentially be entitled to FMLA leave. As such, these inquiries and requests are afforded the same protections under the act from employer interference and retaliation, regardless of whether the employee is actually entitled to FMLA leave. With that in mind, employers should keep their obligations under the FMLA top of mind and take all necessary steps to determine whether an employee qualifies for leave before taking any further action on a request, especially any possible adverse action like denying leave or terminating employment.

For information, please contact the Barnes & Thornburg attorney with whom you work or Grant Pecor at (616) 742-3911 or gpecor@btlaw.com or Aaron Vance at (317) 261-7956 or aaron.vance@btlaw.com.