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FMLA Retaliation Claim Fails Where Employer Believed Claimant Was Abusing Leave

5/24/2012

By W. Kevin Smith

Where the employer had a good-faith belief that an employee out on leave pursuant to the Family and Medical Leave Act (FMLA) was engaged in disability fraud, the trial court properly dismissed the employee's retaliation claim, the 6th U.S. Circuit Court of Appeals ruled.

The employee, who worked for the Cincinnati Bell Telephone Co., felt pain and numbness in his leg. These sensations persisted, despite treatment by his physician. The employee took one week of FMLA leave and returned to work, only to begin an extended FMLA leave two weeks later. While on leave, the employee received disability pay under a Cincinnati Bell policy.

During the extended leave, the employee was diagnosed with a herniated lumbar disc. This medical condition required that the employee avoid sitting and standing for long periods of time. As part of its disability pay policy, Cincinnati Bell offered the employee restricted light-duty work, which consisted of telephone work the employee could perform while seated. The employee's physician determined that he could not work at all until his condition improved.

Shortly after declining light-duty work, the employee was observed walking separately by several co-workers at an Oktoberfest celebration. According to the employee, he left the festival after speaking with his colleagues, as his back was causing him pain. He also admitted to walking 10 blocks to and from the crowded festival.

After the employee was seen at the Oktoberfest, Cincinnati Bell management initiated an investigation into his medical condition. The results of the investigation suggested that the employee's claims of pain were inconsistent with his actions. Consequently, the employee was suspended and later discharged for overstating his pain level so as to avoid light-duty work, and thus obtain full disability benefits. In response, the employee sued Cincinnati Bell, asserting that his discharge was in retaliation for taking FMLA leave. The district court granted summary judgment to Cincinnati Bell.

Affirming the judgment of the district court, the Court of Appeals first determined that analysis under an FMLA retaliation theory was proper. Under this theory, an employee can establish a *prima facie* case of retaliation by showing that: (1) the employee was using rights granted by the FMLA; (2) the employer was aware of his exercise of FMLA rights; (3) the employee was subject to an adverse employment action; and (4) a causal connection existed between the adverse employment action and the use of FMLA leave.

Here, it was undisputed that the employee met the first three prongs of the retaliation test. The fourth prong of the test can be demonstrated by the temporal proximity between the discharge and the protected activity. The Court of Appeals found that the closeness in time between the FMLA leave and discharge of the employee established the fourth prong.

With a *prima facie* case established, Cincinnati Bell was obligated to prove that it took the adverse employment action for a "legitimate nondiscriminatory reason." The court found that the reason offered by Cincinnati Bell, disability fraud, was such a reason. The employee then was obligated to show that the reason offered by Cincinnati Bell was pretextual, i.e., that retaliation was the true motive of the employer. There was record support for the notion that the employee had not committed disability fraud, but rather was operating within his physician's mandated limits while at Oktoberfest. Moreover, the employee was not released to work in any capacity until after the festival.

The court found that after performing a full investigation, Cincinnati Bell held an honest belief that the employee engaged in disability fraud. Thus, even if the employee had not actually engaged in disability fraud, Cincinnati Bell sincerely believed at the time of the discharge that he had, based on a full and fair investigation. As such, the employee could not establish pretext. The claim of retaliation had no support and summary judgment was proper.

Seeger v. Cincinnati Bell Telephone Co., 6th Cir., No. 10-6148 (May 8, 2012).

Professional Pointer: Always perform a full and fair investigation when determining whether to discipline an employee. This axiom is particularly true when the employee is on leave.

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