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Change in Layoff Decision Requires Trial in FMLA Case

By Douglas H. Duerr and William D. Deveney 10/2/2015

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An employee could prevail at trial on her claims that her employer violated the Family and Medical Leave Act (FMLA) by failing to restore her to her former position upon her return from pregnancy leave and by terminating her employment five days after she questioned whether her FMLA rights had been violated, the 8th U.S. Circuit Court of Appeals held.

In 2002, Diversified Distribution Systems LLC hired Jessica Brown as a customer service representative. It later promoted her to the position of backup account executive. In 2009, after receiving excellent reviews as a backup, she was promoted to account executive. In contrast to her strong performance in her support role, however, Brown initially struggled as an account executive. Nevertheless, she received client accolades for some of her work and ultimately received three scheduled pay raises—although one was delayed because she was not meeting expectations at that time.

In December 2011, Diversified was purchased by a new owner and Brown began reporting to Susan Kostecky. The new owner directed his managers, including Kostecky, to rank their employees and discharge the lowest performers. Kostecky ranked Brown among her three lowest performers, but Kostecky and Diversified's human resources director, Mary Louise PirkI, discussed transferring Brown to a restructured backup position in lieu of termination. Before Kostecky could tell Brown about the new position, however, Brown informed Diversified that she was pregnant. PirkI told Kostecky that they should wait to tell Brown about the new position because Brown's pregnancy was high-risk.

Kostecky told Brown of the reassignment to the restructured backup position only after Brown returned from her pregnancy leave in September 2012. Brown complained to Kostecky that she viewed the reassignment as a demotion. At about that same time, the new owner decided to implement the previously-decided-upon reduction in force, and Kostecky recommended that Brown be retained as a backup and that the two other low performers be discharged.

In October 2012, Brown complained to an HR employee about the reassignment during a discussion of Brown's FMLA rights. That complaint was then relayed to PirkI. Shortly thereafter, Brown complained again to Kostecky about the reassignment. Five days later, Brown was discharged; one of the other two low performers previously identified by Kostecky was retained.

Brown sued under the FMLA, claiming that she was entitled to be restored to the position she held before taking FMLA leave and that Diversified had discriminated against her by demoting her to the restructured backup position upon her return from leave and retaliated against her by terminating her employment five days after her internal complaint. The district court granted summary judgment to Diversified on each of Brown's FMLA claims, but the 8th Circuit reversed the holdings as to Brown's entitlement claim and retaliation claim.

» The FMLA provides that an employee who takes FMLA leave is entitled, upon returning to work, to be restored to a position that is the same as, or substantially equivalent to, the position she occupied when the leave began. Diversified did not dispute that the restructured backup position was neither the same as nor substantially equivalent to the account executive position, but it argued that the subsequent reassignment had not interfered with Brown's taking FMLA leave. The 8th Circuit, however, held that Brown's entitlement to her pre-leave position was separate and distinct from Diversified's obligation not to interfere with her leave.

The 8th Circuit also held that the five-day period between Brown's last complaint to Kostecky and her termination was sufficient for a jury to conclude that Brown had been discharged in retaliation for her complaint. Diversified argued that the workforce reduction had been contemplated before Brown's complaint and that Brown had always been ranked among the low performers. But the 8th Circuit found that the reason given for retaining the low performer Kostecky had initially recommended for discharge—his relationship with a valued customer—had been offered by Diversified only after Brown had made her complaint. Therefore, the court found, the evidence called into question the credibility of Kostecky's testimony regarding the firing and the matter had to proceed to trial.

Brown v. Diversified Distribution Sys., LLC, 8th Cir., No. 14-2685 (Sept. 4, 2015).

Professional Pointer: The appeals court reaffirmed the principle that when personnel actions are planned and contemplated, employers can still implement those actions even if the final decision to do so was not made until after an employee engaged in protected conduct (e.g., requested FMLA leave or complained of unlawful activity). However, when the planned action (here, keeping Brown and terminating a co-worker) changes after the employee engages in protected conduct, there is a presumption that the change was caused by the conduct and constitutes retaliation.

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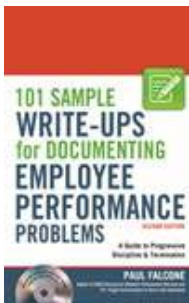
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