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Eleventh Circuit Endorses Heightened Standard for FMLA Retaliation Claims, Deepening Circuit Divide

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In a win for employers, the Eleventh Circuit Court of Appeals issued a decision on December 13, 2023, which formally adopted the "but for" causation standard for retaliation claims brought under the Family Medical Leave Act ("FMLA"). In so doing, the Eleventh Circuit not only made it more challenging for plaintiffs to succeed on FMLA retaliation claims, but it deepened the divide among federal courts, which have adopted conflicting standards.

In *Lapham v. Walgreen Co.*, No. 21-10491 (11th Cir. 2023), the plaintiff was a long-time employee of Walgreen with a history of performance issues. The plaintiff frequently used FMLA leave to care for her son, who had certain health issues. In Spring 2017, the plaintiff's performance continued to decline as she simultaneously was applying for intermittent leave under the FMLA. After the plaintiff's manager determined that the plaintiff had "exaggerated the truth" about completing her job duties and encouraged other employees to avoid completing their work, Walgreen fired the plaintiff from one of its Florida stores. Plaintiff filed suit against Walgreen, alleging, among other things, that Walgreen terminated her in retaliation for her request for FMLA leave.

The Middle District of Florida originally determined the plaintiff and Walgreens should proceed to trial because the plaintiff had proven her FMLA leave request was at least a "motivating factor" in Walgreen's decision to terminate her employment. But in a surprising move, the district court agreed to reconsider its decision before ultimately dismissing the FMLA retaliation claim, finding that the plaintiff could not prove that her request for leave was the "but for" cause of her termination. On appeal, the Eleventh Circuit agreed, holding that FMLA retaliation claims must be proven via "but for" causation.

This decision is significant for employers fighting against FMLA retaliation claims in Eleventh Circuit courts (those in Florida, Georgia, or Alabama). A plaintiff proving that a request for or use of FMLA leave at least partly "motivated" an employer's decision is no longer enough. Now, a plaintiff must show that, but for the plaintiff's request for, or use of, FMLA leave, the company would not have taken an adverse employment action against them. The Eleventh Circuit characterized this burden as "the straw that broke the camel's back." Faced with this much more stringent burden, a greater number of employers will be able to successfully overcome FMLA retaliation claims in the Eleventh Circuit.

The Eleventh Circuit is the latest federal appellate court to weigh in on the issue, with courts across the country conflicted about whether the "motivating factor" or "but for" standard is the correct one. With the *Lapham* decision, the Eleventh Circuit is firmly on the record for a "but for" standard. The Sixth Circuit has tread gently, concluding in an unpublished opinion that the "but for" standard

"seems" correct. The Second, Third, and Fifth Circuits have all gone the other route, concluding the "motivating factor" standard is proper. The remaining appellate courts have yet to take up the issue, while trial courts across the country have reached their own conclusions.

Given the significance of this issue and the disagreement among lower courts, the odds are that the U.S. Supreme Court will eventually address the matter itself and issue a final determination as to which standard is correct. But for the time being, employers will have to remain mindful of the FMLA causation standard accepted in their jurisdiction.

To learn how these developments can affect your business, contact a member of Benesch's Labor & Employment Practice Group.

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