

Management Update

December 30, 2011

Second Circuit Lightens the Burden for Plaintiffs Bringing FMLA Retaliation Claims

Executive Summary: For the first time, the Second Circuit Court of Appeals has held that a "material adverse employment action" in the context of a Family Medical Leave Act (FMLA) retaliation claim need not be all that "material." See *Millea v. Metro-North R.R. Co.*, (2nd Cir. August 8, 2011).

Background

Millea suffered from severe post-traumatic stress disorder as a result of combat as a Marine during the First Gulf War, which caused unpredictable panic attacks and exhaustion that could require time off from work on short notice. Millea began working for Metro-North in 2001. In 2005, he applied for and was granted intermittent FMLA leave for 2006.

In the summer of 2006, Millea and his supervisor (with whom he had a contentious relationship) got into a heated telephone conversation that triggered one of Millea's panic attacks. Millea immediately left work and saw his doctor. Because the encounter with the supervisor led to the attack, Millea did not inform the supervisor of his unforeseen FMLA leave. Instead, Millea informed the lead clerk and asked him to inform the supervisor, which he did. The next day, Millea called the lead clerk again to report that he would be taking another FMLA day and this information was again relayed to the supervisor.

The employer's internal leave policy requires an employee to provide direct notice to his or her supervisor as soon as possible when the need for FMLA leave is unforeseeable. Because Millea did not notify his supervisor directly, his absences were logged as non-FMLA leave. The employer opened an investigation of Millea, which resulted in a formal Notice of Discipline being placed in his employment file for one year.

Millea subsequently sued the employer for FMLA interference, FMLA retaliation, and intentional infliction of emotional distress (IIED). A jury returned a verdict in favor of Millea on his FMLA interference claim, but against him on his FMLA retaliation and IIED claims.

Both parties appealed the jury verdict. The Second Circuit upheld the jury's verdict as to the FMLA interference and IIED claims, but vacated and remanded the case for retrial on the FMLA retaliation claim.

FMLA Retaliation Claim

To prove a retaliation claim under the FMLA, an employee must show that an employer intentionally discriminated against him for exercising his FMLA rights. To prove a claim through circumstantial evidence, the employee may establish a prima facie case of retaliation by showing: (1) he engaged in statutorily protected activity, (2) he suffered a materially adverse employment action, and (3) the decision was causally related to the protected activity.

At issue in this case was the trial court's denial of Millea's requested jury instruction on "materially adverse employment action." Millea sought a charge using the definition articulated by the Supreme Court in the Title VII lawsuit, *Burlington Northern & Santa Fe Ry. v. White*, 548 U.S. 53, 60 (2006). Specifically, Millea proposed that an adverse employment action occurs when "a reasonable employee in the plaintiff's position would have found the alleged retaliatory action materially adverse," and that a retaliatory action is "materially adverse" when the action "would have been likely to dissuade or deter a reasonable worker in the plaintiff's position from exercising his legal rights."

The trial court rejected Millea's proposed instruction; however, on appeal the Second Circuit held that the trial court's instruction on "materially adverse" was impermissibly narrow. The Second Circuit found that the Supreme Court's expansion of the definition of "materially adverse employment action" for purpose of Title VII retaliation claims applies to FMLA retaliation claims as well.

In reaching this decision, the Second Circuit followed the reasoning of several other federal appeals courts, including the Third, Fourth, Fifth, Seventh and Tenth Circuits. The court held that "[f]or purposes of the FMLA's anti-retaliation provision, a materially adverse action is any action by the employer that is likely to dissuade a reasonable worker in the plaintiff's position from exercising his legal rights." In remanding the case for a new trial on this claim, the court noted that a reasonable jury could determine that a letter of reprimand would deter a reasonable employee from exercising his FMLA rights.

FMLA Interference Claim

Although the Second Circuit upheld the jury's verdict on the FMLA interference claim, it held that the employer's internal policy requiring direct notice is inconsistent with the FMLA.

The FMLA generally requires employees to "comply with the employer's usual and customary notice and procedural requirements for requesting leave." 29 C.F.R. § 825.303(c). This requirement, however, is relaxed in "unusual circumstances" or when the company policy conflicts with the law. When the need for FMLA is unforeseeable (as Millea's was), the FMLA allows notice to be given by "the employee's spokesperson (e.g., spouse, adult family member, or other responsible party) if the employee is unable to do so personally." 29 C.F.R. §§ 825.303(a) and (c).

The Second Circuit held that since this regulation specifically condones indirect notification when an employee is unable to notify directly, the employer's policy conflicts with the FMLA and is invalid to the extent it requires direct notification even when the FMLA leave is unforeseen and direct notification is not an option. The Second Circuit held that the question of whether a situation constitutes an "unusual situation" in which an employee is "unable" to provide direct notification is a question of fact for the jury to decide.

Employers' Bottom Line:

The Second Circuit's decision is significant because it is the first time this court has recognized the broader definition of "materially adverse employment action." If other federal appeals courts continue to adopt this broader definition, more employers may find themselves involved in litigation over whether an action taken against an employee was "materially adverse." This decision is also significant because it holds that an employer's rigid policy of requiring employees to directly notify their supervisor of a need for FMLA leave, even if the leave is unforeseeable, is invalid as inconsistent with the FMLA.

If you have any questions regarding the issues addressed in this article, please contact the author, Michelle Tatum, an attorney in our Jacksonville office, at mtatum@fordharrison.com or the Ford & Harrison attorney with whom you usually work.