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'You Can't Do That to Me, I Requested FMLA Leave!' - Proving FMLA Retaliation

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Employers are often hesitant to take disciplinary or other actions with an employee who has recently requested or has taken leave under the Family and Medical Leave Act (FMLA). While the law does not prohibit such action, employers should maintain a heightened awareness when dealing with employees who have exercised their FMLA rights. Similar to other federal employment statutes the FMLA includes retaliation provisions and often adverse employment actions (such as demotions, changes in position, suspensions, or terminations) are argued to be retaliatory when they are in close temporal proximity to an FMLA leave or requested leave.

Plaintiffs raising claims of retaliation must show that (1) they engaged in protected activity (i.e. they requested or took FMLA leave), (2) they were subject to adverse employment action (e.g. discipline, demotion, termination) and (3) there was a "causal connection" between the two.

The question of "causal connection" is what usually trips up employers - what will connect an employer action and an FMLA- protected event to establish retaliatory motive? Most retaliation cases are built on circumstantial evidence, including the timing (temporal proximity) of the adverse action in relation to the FMLA leave/request. The element of a causal connection has been the subject of scrutiny since the Supreme Court's ruling in 2013 in *University of Texas Southwestern Medical Center v. Nassar*, which held that a causal connection under Title VII retaliation claim is shown if the employee demonstrates that the adverse employment action would not have occurred "but for" the employee's protected activity.

Many courts prior to the decision in *Nassar* applied the lesser causation standard of "motivating factor" under the FMLA. The "motivating factor" standard provides that an employee need only demonstrate that the protected activity was one of the factors that contributed to the adverse employment decision. The Second Circuit will be the first circuit court to address the question directly of whether the Supreme Court's "but for" standard in *Nassar* should be applied in the context of an FMLA retaliation claim. In the case of *Woods v. START Treatment & Recovery Centers*, the lower court applied the *Nasser* "but for" standard in an FMLA retaliation case; however, the employee is appealing and arguing that the language of the FMLA retaliation is broader than that of the Title VII retaliation provision. Once the Second Circuit has ruled, we may have an indication of which standard courts will apply in FMLA retaliation cases going forward.

The impact of the causation standard on FMLA retaliation claims could affect the number of claims filed and the likelihood of summary judgment for the employer. Should the Court's adopt the "motivating factor" standard applicable to FMLA retaliation claims, employers will need to take greater care in dealing with those who undertake to use FMLA leave.

Training managers and supervisors to ensure that employees taking FMLA leave or exercising FMLA rights are not treated any differently from other employees is the best preventative measure. Such training should include making sure that all policies are applied consistently to all employees, meaning if the implementation of a policy is generally somewhat lenient it cannot be implemented strictly with regarding to employees taking FMLA leave.