

Transfer after taking FMLA leave? That could be considered retaliation

If you transfer an employee soon after she has returned from FMLA leave, you could wind up facing an FMLA retaliation lawsuit. That's true even if the transfer comes with the same pay and benefits. If the title seems less impressive or if there is less room for advancement, the move could be considered retaliation.

And as long as the employee can show the transfer was motivated by the use of FMLA leave, she can take a lawsuit to a jury.

Recent case

Carla worked for MMC Holdings as a customer service representative in its physician billing division. Her job was to answer the phone and speak with insurance companies, doctors' offices and patients about medical bills.

For the first few years, she received consistently good reviews. She earned a promotion to supervisor in the customer service department and oversaw the work of four customer service representatives.

Carla began to complain that her new supervisor was overly harsh and criticized her for minor things that he let others get away with.

Then Carla took FMLA leave to care for her ill son. She had to extend that leave beyond the 12 weeks allowed under the FMLA. When she contacted her supervisor to discuss her leave and return, he allegedly told her she didn't have a job anymore.

She complained, going above the supervisor, and learned that she had not, in fact, been terminated. Instead, she had been transferred. Allegedly, the company discovered that her subordinates worked just fine without her supervision. Therefore, the company decided it could save money by eliminating her supervisory position.

The transfer came with the same salary and benefits she had before. In fact, the company paid her more than the pay scale for the new position indicated. However, Carla now had a different job title, and it was not a supervisory position.

Carla took the transfer, but considered it a demotion. She sued, alleging that the transfer was actually retaliation for taking FMLA leave.

Carla told the court that a comment her supervisor had made when she asked for extra leave to care for her son showed his anger at her. He allegedly said, "Now it is a disability? For one month ... unreal."

The court agreed that the transfer could be retaliation. It pointed out that the timing was suspect and that the new position did carry with it less prestige, even if the pay was the same.

It noted that the pay range for the new position was lower than Carla's previous position, and that the new job came with fewer opportunities for promotion—both possible indications of a demotion.

Finally, the court noted the supervisor's comments about her request for additional leave, suggesting a jury could view that as evidence of retaliation. Carla's lawsuit can proceed. (*Ottley-Cousin v. MMC Holdings*, ED NY, 2019)

Note that the court said Carla had an FMLA retaliation claim even though she was technically not entitled to reinstatement because she had used up her 12 weeks of job-protected leave. But if the reason she was demoted was to retaliate for taking FMLA leave, that would be a violation of the FMLA.

Prepare to pay up when retaliation is alleged

Even if you win an employment discrimination case, you may end up losing if someone foolishly retaliates against the employee for complaining in the first place.

To make matters worse, even a modest monetary award can skyrocket once the court adds in the attorneys' fees you then owe the employee who sued you. That's true under Texas' Labor Code as well as Title VII.

Recent case

Cathryn, who is over age 40, worked as a senior paralegal for Apache Corp. beginning in 2006. Her first supervisor was a woman. Then a man took over.

Soon, a younger senior paralegal received a raise and an enhanced title reflecting that she did additional legal work. Cathryn complained since she, too, did additional tasks beyond basic paralegal work. When she asked about a promotion, Cathryn claimed her supervisor mockingly told her to get a law degree.

Cathryn then complained to the company's employment attorney that she was being discriminated against because of her age. Soon after, Cathryn's supervisor revoked a flexible schedule she had been using for several years.

When she complained about that, Cathryn's boss fired her for refusing to work the schedule he set and for allegedly working unauthorized overtime.

She sued, alleging age discrimination and retaliation under the Texas Labor Code.

A jury awarded her \$150,000 for the emotional pain and suffering resulting from retaliation, plus \$767,000 in attorneys' fees. Apache Corp. appealed, but the court upheld the award, less a small portion of the legal fees.

It noted that Cathryn didn't have to prove the underlying age discrimination case in order to win her retaliation claim. The court said there was enough evidence that Cathryn's supervisor had targeted her for discharge for complaining in the first place. (*Apache Corporation v. Davis*, Court of Appeals of Texas, 2019)