

A Troubling Prognosis – Extra care needs to be taken when letting go an employee who has given notice of need for FMLA leave

On October 18, 2011, the United States Court of Appeals for the Seventh Circuit reversed a U.S. District Court’s decision to grant an employer-defendant’s motion for summary judgment in a case involving alleged discrimination and retaliation in violation of the Family and Medical Leave Act (“FMLA”). Based on the employer’s position that it would have terminated the employee regardless of his notice of need for FMLA leave, the District Court concluded that there were no genuine issues of material fact that, even if viewed in a light most favorable to the plaintiff, would allow a jury to find in favor of the plaintiff. The Seventh Circuit, however, disagreed with the District Court’s decision based on several facts that, when viewed in a light most favorable to the plaintiff, could allow a jury to find in favor of the plaintiff.

The case, *Schaffer v. American Medical Association*, involves a plaintiff who was a full-time employee that, by 2008, rose in the ranks to the position of Director of Leadership Communications. By August 2008, the economic downturn began to take its toll on the AMA, and all departments were asked to reduce their 2009 budgets to 3% below the 2008 budget level. During the following month, the plaintiff’s department head determined that one position within the department would need to be eliminated. By the end of the following month, on October 28, 2008, the department head decided to eliminate the Communications Campaign Manager position—a position other than plaintiff’s position—because that position’s duties had changed drastically and the AMA had already stopped pursuing one of that position’s core campaigns. While the department head was asked to consider eliminating additional positions, he ultimately advised the Chief Financial Officer that he did not think cutting any additional positions would be in the organization’s best interest.

About one month later, in November 2008, the plaintiff advised his department head that he would be having knee replacement surgery in the early part of 2009, and as a result, he would need 4 to 6 weeks of FMLA leave. About ten days later, the department head sent the CFO an email explaining that he had an “11th hour change of heart” and now wanted to eliminate the plaintiff’s position, and he also noted in his email that, as the department was already preparing for the plaintiff’s leave, his departure would not have any “immediate negative impact.” The plaintiff was notified by his department head and the AMA’s Human Resources Representative a few days later that he was being let go.

In February 2009, AMA’s in-house counsel met with the HR Rep and informed him that the plaintiff might sue the AMA. On or about February 3 or 4, 2009, the plaintiff’s department head typed a memorandum explaining the rationale for selecting the plaintiff as the employee to let go, but he backdated the memorandum to November 21, 2008—a date prior to when the plaintiff gave his notice of his need for FMLA leave. On February 3, 2009, the HR Rep typed up the handwritten notes he had taken during his discussion

with the plaintiff's department head regarding the elimination of the plaintiff's position. The HR Rep dated his notes November 25, 2008 and shredded his original handwritten notes. The plaintiff did in fact sue the AMA and during the discovery process, the AMA gave differing reasons for eliminating the plaintiff's position.

In defense to the plaintiff's claims, the AMA took refuge in established legal precedent that an employer does not violate the FMLA if the employer does not return an employee to a position after returning from FMLA leave if the employee would have been let go even if he had not taken the FMLA leave, so long as the termination decision was not related to the FMLA leave request. While the District Court believed that the AMA would have let the plaintiff go despite his request for FMLA leave, the Seventh Circuit found that several pieces of the evidence created an issue of "triable fact" as to whether the AMA's decision had a discriminatory motive.

The Seventh Circuit found that the plaintiff's department head's decision to eliminate the Communications Campaign Manager position and his affirmative statement that any further eliminations would not be in the best interest of the organization, and his subsequent decision to eliminate the plaintiff's position, noting that the department was already preparing for plaintiff's FMLA leave, was potential evidence of a discriminatory motive. Plaintiff's evidence was strengthened by the fact that the only intervening event between the AMA's "11th hour change of heart" was the plaintiff's notice that he intended to take FMLA leave. Also, the Seventh Circuit found that a jury might agree with the plaintiff and conclude that the HR Rep's backdating the memorandum explaining why the plaintiff was being let go, and the department head's backdating his notes in conjunction with his destruction of the original notes were both intended to conceal a discriminatory motive. Finally, the Court believed that a jury could view the AMA's differing explanations given at different times for plaintiff's lay-off as pre-textual and, therefore, evidence of discrimination.

The Court concluded its decision by explaining that a jury could very well agree with the AMA and find that the plaintiff's notice of FMLA leave had no impact on its termination decision. The Court offered reasonable explanations to explain away the evidence. However, the evidence was sufficient to create issues of triable fact, and, therefore, the District Court should not have granted the AMA's motion for summary judgment.

While it is unclear at this point whether the facts and evidence in this case will lead a jury to conclude that the AMA did indeed discriminate or retaliate against the plaintiff, there is a lesson or two to be learned. First, claiming that an employee was let go for reasons not related to the employee's notice of need for FMLA leave is subject to challenge. Second, certain evidence can be used to prove that an employee was **not** going to be let go **but for** his notice of need for FMLA leave, such as a change in an employer's decision about who and why an employee is going to be laid-off or terminated. Third, creating an after-the-fact paper trail and trying to make it seem as if the paper trail was made contemporaneously can be evidence of a discriminatory motive, especially when the documents are backdated. An employer has the right to change its mind about whom

to lay-off, regardless of whether the employee targeted for lay-off has requested FMLA leave. It is reasonable for an employer to create a paper trail explaining its thought process, even if the paperwork is completed after-the-fact. However, when an employer knows of the need for FMLA leave, extra precautions need to be taken to make clear that the decision is not related to the employees need for FMLA leave. In these types of cases, employers should consult with legal counsel to determine the best course of action.

If you have any questions about this article, or would like a sample FMLA Policy please contact Attorney Julie A. Proscia, Esq. Julie Proscia is a partner at SmithAmundsen LLC in the labor and employment practice group. Julie exclusively represents management in employment issues and may be contacted at (630) 587-7911 or at jproscia@salawus.com.