

FIRING EMPLOYEE FOR REQUESTING FMLA LEAVE MAY BE INTERFERENCE AND RETALIATION

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The Third Circuit has held that firing an employee for a valid request for FMLA leave may constitute interference with the employee's FMLA rights as well as retaliation against the employee. Further, the requirement that an employee "take" FMLA leave connotes invocation of FMLA rights, not actual commencement of leave.

Brenda Erdman worked full-time for Nationwide Insurance Company, beginning in 1980. In 1998, she asked to work part-time so she could care for her child who had Down syndrome. She was permitted to work part time and eventually a four-day week. This change made Erdman a non-exempt employee.

Erdman was considered a good employee and she often put in extra hours at home. She was permitted to take "comp time" in exchange for this work. However, in 2002 when she began working for a new supervisor, she was told only to work the hours she was supposed to and not "put in" for extra hours. After sending an e-mail to inquire about whether or not she could still work in exchange for comp time and getting no response, Erdman still continued to work extra in exchange for comp time.

Erdman was then admonished by her supervisor for unapproved overtime, as well as doing "field work" that she was not authorized to do. She was then told she could not work extra in exchange for comp time.

Shortly thereafter, Nationwide told Erdman that it had eliminated her part-time position and told her that she must work full-time. Nationwide claims that at this point, Erdman became angry. They claimed that Erdman then began inappropriately questioning other employees about confidential salary information, encouraging others to work slowly to avoid driving up production standards, making malicious accusations against her supervisor, and committing various other acts of insubordination. Erdman disputed these claims.

Erdman then was told she could not take the vacation in August that had previously been approved when she was in her part-time position. She claimed she used this time to get her child ready for school and if it was not approved she would request FMLA leave instead. Erdman submitted the paperwork for the FMLA leave. Nationwide then fired Erdman claiming behavioral problems.

Erdman sued under the FMLA claiming that she was terminated in retaliation for filing a claim. The district court granted summary judgment in favor of Nationwide, finding that Erdman had not worked the required 1,250 hours in the past 12 months as required by the FMLA. Erdman argued that she had worked 1,298.25 hours in the past 12 months, including 118.5 hours at home. The district court found that prior to her email asking about comp time, Nationwide had no constructive notice of her hours worked from home. Based on the district courts calculations, Erdman did not meet the hours worked requirement under the FMLA. Erdman appealed.

Eligible hours. On appeal to the Third Circuit, Nationwide offered several reasons why it had no actual or constructive notice of Erdman working extra hours. The claimed that Erdman was told not to work additional hours when her exempt status was changed, only her original supervisor knew of the extra time she was working and she was again specifically told not to

work extra hours.

The appeals court rejected these reasons. “Despite the superficial appeal of Nationwide's arguments,” noted the court, “they fail to persuade because they do not account for Erdman's use of “comp” time.” The court found that although Nationwide told Erdman not to work extra hours, it doesn't change the fact that Erdman had indeed worked extra hours for several years. According to the court, telling her that she could no longer “put in” for hours was unclear--did it mean she could still work the hours and not get paid for them or did it mean she could not work any extra hours outside the office. “Absent any clear indication to the contrary from Nationwide,” found the court, “a reasonable jury could conclude that the purpose of [the supervisor's] communication was to prohibit Erdman from being paid for more hours than she was scheduled to work each week, without regard to whether Erdman could continue to accrue ‘comp’ time.”

After holding that the remedial eligibility regulation under the FMLA was invalid, the court turned to the issue of whether Erdman could claim retaliation without having actually taken the leave. The court found that for interference claims, the employee need not actually take the FMLA leave, but for retaliation, the statute was not as clear. Looking to the retaliation portion of the FMLA, the court emphasized that it stated that employers were prohibited from “discriminating against employees or prospective employees who have used FMLA leave.”

The court found that to prevent an employee from pursuing retaliation without having actually taken the FMLA leave would “perversely allow an employer to limit an FMLA plaintiff's theories of recovery by preemptively firing her.” Thus, according to the court, “we interpret the requirement that an employee ‘take’ FMLA leave to connote invocation of FMLA rights, not actual commencement of leave. We therefore hold that firing an employee for a valid request for FMLA leave may constitute interference with the employee's FMLA rights as well as retaliation against the employee.”

References. *Erdman v. Nationwide Ins. Co.*, 582 F.3d 500 (3d Cir. 2009). See Employment Coordinator, Benefits § 12:67. See also Guide to Emp. Law and Reg. §20:13.