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Employee Whose Boss Gave Him Heartburn Has No Remedy Under the Family Medical Leave Act

By Michael Mishlove, Esq.

The Family and Medical Leave Act ("FMLA") not only confers upon employees certain substantive rights (most notably the right to take up to 12 weeks of unpaid leave to care for the serious health condition of the employee or family member), it also protects employees from being discriminated against and/or retaliated against for exercising their substantive FMLA rights. It is clear in this regard that if an employee takes FMLA leave, his/her employer may not use that exercise of rights as a negative factor when taking employment actions (e.g., hiring, promoting/demoting, disciplining) in connection with the employee. It is important to note that the scope of the FMLA's anti-retaliation protections is not limited to concrete tangible employment actions, such as discipline, demotion, and discharge; to the contrary, any adverse action that would dissuade a reasonable employee from exercising his or her rights under the FMLA can support a retaliation claim. Harassment of an employee for taking FMLA leave falls squarely within the scope of the proscription against retaliation under the FMLA, and federal courts have most certainly entered judgments and punitive damage awards against employers where the evidence revealed that the employer engaged in harassment of an employee because of the employee's use of FMLA leave. Of course, as is the case in other areas of employment law, conduct by an employer that amounts to petty slights, minor indignities and annoyances, petty oppressions, and other trivialities will generally not support a retaliation claim under the FMLA. That having been said, employers are well-advised to ensure that their managerial/supervisory-level personnel are able to compartmentalize and quell any ill will or animus they might

harbor against an employee based on that employee's lawful and proper exercise of rights under the FMLA - for, one really does not want to find oneself defending an FMLA retaliation claim arguing, "Okay, sure we harassed Mr. Smith, but the harassment really didn't amount to anything more than the heaping of a few minor indignities here and there."

Just last month, the United States Court of Appeals for the Seventh Circuit (covering Illinois, Indiana, and Wisconsin) confronted a case in which the Court had found that the plaintiff had arguably been subjected to actionable retaliation and confronted a novel issue regarding the scope of remedies available under the FMLA. In 2001, the plaintiff in *Breneisen v. Motorola, Inc.*, 656 F.3d 701 (7th Cir. 2011), had taken FMLA leave to receive treatment for gastroesophageal reflux. After exhausting his 12 weeks of FMLA, he returned to work but then took an approved (non-FMLA) medical leave for esophageal surgery. He returned to work after about three months but six months later took a third leave, from which he never returned to work, to undergo a total esophagectomy. As explained by the Court, Mr. Breneisen alleged that "the esophagectomy was necessary because a supervisor at Motorola caused him to suffer stress, high blood pressure, and stomach reflux, all of which exacerbated his pre-existing medical condition." The gist of the plaintiff's claim for monetary damages under the FMLA was that the stress caused by his employer's alleged harassing conduct exacerbated his medical condition and caused him to be permanently unable to work. In turn, he commenced a retaliation action seeking, among other things, an award of back pay and front pay.

Like the district court, the court of appeals rejected the employee's argument that an employer's alleged conduct that exacerbates the employee's medical condition to the point where he/she cannot return to work following exhaustion of his/her FMLA leave entitlement can be the predicate for an award of front pay. The FMLA, the Court concluded, simply did not authorize such relief under the circumstances present in the case - most notably, the fact that Mr. Breneisen had exhausted his leave entitlement. In explaining its rejection of the "exacerbation theory," the Court explained:

Since stress can adversely affect many common ailments from which physically infirm employees suffer, granting relief on this basis would contravene the straightforward premise of the FMLA - to protect employees from adverse actions by their employers during finite periods when short-term personal or family medical needs require it. When serious medical issues render an employee unable to work for longer than the twelve-week period contemplated under the statute, the FMLA no longer applies. This is true regardless of the cause of the infirmity.

Although the holding in *Breneisen* is clearly "employer friendly," and some management-side pundits are hailing the decision in broad-brush terms based on its rejection of the exacerbation theory of recovery, it is important to bear in mind the narrowness of the

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Court's holding in light of the uniqueness of the facts. As an initial matter, the decision should most assuredly not be read as giving employers *carte blanche* to harass employees based on their proper exercise of rights under the FMLA. The determinative consideration that led the Court to conclude Mr. Breneisen had no claim for relief was that he had exhausted his FMLA leave. It certainly remains an open question whether Mr. Breneisen might be entitled to compensatory damages if he had not exhausted his leave entitlement and required additional leave due to the employer's exacerbation of his medical condition. Moreover, as the Court noted in its decision, while the reason for Mr. Breneisen's inability to work (namely, the alleged exacerbation of his condition caused by his superior's harassment) was not relevant to his right to relief under the FMLA, it is certainly relevant to other claims Mr. Breneisen may have had under tort law, such as a claim for intentional infliction of emotional distress under state law.

The bottom line here is that notwithstanding the limitation on recovery for harassment under the FMLA endorsed by the Seventh Circuit in *Breneisen*, employers should assiduously ensure that managers and/or supervisors do not let their employees' proper exercise of FMLA rights become a factor in their employment actions or their interpersonal relations with their subordinates.

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