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Amanda Tiebert Collman, *Robbins Schwartz* [1], Chicago

312-332-7760 | E-Mail Amanda Tiebert Collman [2]

Measures Taken in Compliance with FMLA and ADA Cannot Constitute Retaliatory Adverse Action

The Seventh Circuit issued a major victory for employers confronted with lawsuits alleging that they discriminated or retaliated against employees when, in actuality, they were simply acting consistent with federal statutes such as the Family and Medical Leave Act of 1993 (FMLA), Pub.L. No. 103-3, 107 Stat. 6, or the Americans with Disabilities Act of 1990 (ADA), Pub.L. 101-336, 104 Stat. 327. In *Freelain v. Village of Oak Park,* No. 16-4074, 2018 WL 1999330 (7th Cir. Apr. 30, 2018), the Seventh Circuit held that an employee cannot succeed on a claim of FMLA or ADA retaliation by asserting that the employer did exactly what the FMLA allows. (NOTE: The author of this article represented the Village of Oak Park before the Seventh Circuit.) In so holding, the court proclaimed

granting an employee's FMLA rights to unpaid leave consistent with the statute's explicit terms cannot constitute a retaliatory adverse action under the FMLA itself or under the ADA, at least without evidence that his employer deviated from its normal paid leave practices and targeted him for unpaid leave because he asserted his statutory rights. 2018 WL 1999330 at *3.

Factual Background

Rasul Freelain, who was a police officer with the Village of Oak Park, alleged that a female supervisor made what he perceived as inappropriate and unwelcome sexual advances toward him over the course of his employment. Freelain reported the supervisor's actions to the village, which hired an outside agency to investigate the matter. Prior to learning the results of the investigation, Freelain began taking days off work due to migraines, stress, and sleeplessness that, in his suit, he attributed to the supervisor's continued presence at the workplace. A few months later, Freelain was informed of the results of the investigation and further notified that the village would require him to pass a psychological fitness for duty examination before returning to work. This process took longer than six weeks.

Freelain used his paid sick leave to account for the time he was off work due to migraines, etc., as well as for the six-week absence required to be evaluated for fitness for duty. Freelain complained to the village that he should not be required to use his sick leave during the fitness for duty process; the village agreed, but did not reinstate Freelain's sick leave days for a few months.

During this time, Freelain's wife became ill, which led him to request and receive FMLA leave. Before the village reinstated his sick leave days, Freelain was forced to either take unpaid time off or continue to work to receive pay. Freelain filed a charge of discrimination with the Equal Employment Opportunity Commission (EEOC) and then filed suit against the village asserting various claims under the FMLA and ADA. The district court granted the village summary judgment, and Freelain appealed the decision on his claims of retaliation under the FMLA and ADA. On appeal, Freelain argued that the village took the following three adverse actions against him in response to him asserting his rights under these statutes:

the village misclassified his sick leave taken for migraines, stress, and sleeplessness, and his absences while awaiting the fitness for duty evaluation;
the village required him to undergo a psychological fitness for duty examination; and
the village waited three months before approving his request to engage in secondary employment.

Seventh Circuit's Decision

The Seventh Circuit's analysis focused on whether the three actions could constitute materially adverse actions that would support claims of retaliation. The Seventh Circuit ultimately answered this question in the negative.

The Seventh Circuit began its analysis with a reminder that employers are only required to provide *unpaid* leave under the FMLA. This admonition was paramount because Freelain's claims were based on the village's refusal to grant him paid leave, which the village is not required to do under the FMLA. The Seventh Circuit agreed with the village's position stating that neither the FMLA nor the ADA require employers to provide a single day of paid leave.

Consistent with the above reminder, the court determined that the drawdown of Freelain's paid sick leave for his absences due to his personal illness was "wholly consistent with the terms of the FMLA." 2018 WL 1999330 at *5. Further, it found that Freelain was made whole for the sick leave drawdown that occurred when he was required to undergo a fitness for duty examination and that Freelain provided no evidence that the village's actions were conducted with malice or recklessness. The court recognized that while additional scrutiny could be required when the employer deviates from its regular policy or practice, this was not the case for Freelain because he had produced no evidence that the village routinely applied its leave classifications differently than it did for him.

Concerning the second alleged adverse employment action, *i.e.,* the fitness for duty examination, the court quickly dispensed with Freelain's argument holding that "the facts of this case fit squarely within the bounds of a permissible medical evaluations." 2018 WL 1999330 at *6. It is well settled in the Seventh Circuit that public safety agencies can require psychological fitness for duty examinations when they are used to determine a worker's ability to perform work functions safely. Moreover, with respect to Freelain's specific allegations, the court found that "[a] reasonable jury could not find that the village acted unreasonably by ordering Freelain to undergo a fitness for duty evaluation after taking several weeks off due to stress-related medical symptoms" as the evaluation served a legitimate purpose given the risks posed by a police officer not well enough to work. *Id.*

As for the third alleged adverse action, *i.e.,* the delay in approving his secondary employment request, the court found Freelain's allegations insufficient since there was no evidence that the village had a policy of granting such requests automatically or that it treated Freelain differently than other officers because he exercised his rights under the FMLA and ADA.

Finally, the court reviewed Freelain's claims under the new standard established in *Ortiz v. Werner Enterprises, Inc.,* 834 F.3d 760 (7th Cir. 2016), which examined whether, taking the actions as a whole, a reasonable employee in Freelain's shoes would be dissuaded from exercising his or her statutory rights. The court found that a reasonable employee would not be dissuaded but that perhaps a claim such as Freelain's could survive if the employee produced evidence of insidious deviations from an employer's policies or practices.

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URLs in this post:

[1] *Robbins Schwartz*: **http://www.rsnlt.com**
[2] E-Mail Amanda Tiebert Collman: **mailto:acollman@robbins-schwartz.com**
[3] Image: **https://www.facebook.com/IICLE**
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