

## NO PROTECTION UNDER FMLA FROM PERFORMANCE ISSUES DISCOVERED WHILE ON LEAVE

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It is a familiar scenario—an employee goes out on a planned FMLA leave to deal with a personal health matter. Prior to going on leave, the employer had some concerns regarding the employee's job performance, but serious disciplinary action, such as demotion or termination, had not been contemplated. While the employee was on FMLA leave, the employer becomes aware of additional performance issues and decides that the employee cannot return to the former position. The employee brings a lawsuit alleging that the failure to reinstate constituted unlawful interference with the right to take FMLA leave and was in retaliation for exercising FMLA rights.

Did the employer violate the employee's FMLA rights? Not according to the Eleventh Circuit Court of Appeals decision in *Schaaf v. SmithKline Beecham Corp.*, decided on April 6, 2010. Schaaf, a regional vice-president since 1999, had been placed on a performance improvement plan (PIP) in July 2002 as a result of her region's lagging sales, inflexible management style, poor communication skills, inaccessibility, failure to complete employee performance evaluations, and other deficiencies. Shortly thereafter, Schaaf announced that she was pregnant and would take FMLA leave in early 2003. Thereafter, Schaaf was not diligent in meeting the requirements of her PIP. While she was on FMLA leave, her interim replacement discovered several significant and previously unknown performance problems, including "scores" of unpaid expense reports and unpaid invoices to outside creditors. Productivity and employee morale dramatically improved during her absence. Shortly before her scheduled return to work, Schaaf was informed that she would not be resuming her position as regional vice-president, but was instead given the option of accepting a demotion or termination. Schaaf accepted the demotion, then filed suit under the FMLA, alleging that her demotion constituted unlawful interference with her right to take FMLA leave and retaliation for availing herself of her FMLA rights.

The trial court granted summary judgment to the employer. On appeal, the 11th Circuit made clear that an employee cannot prevail in a FMLA interference claim unless it is shown that the employee's FMLA use was the

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proximate cause of the adverse action. In clear and concise language, the court explained:

The purpose of the FMLA is to allow individuals to temporarily put their careers on hold in order to tend to certain personal matters, like the care of a newborn child. Its purpose is not to aid an employee in covering up her work-related deficiencies. If an employee were demoted or discharged for the reason that she took an FMLA leave...the employee should be able to sue for FMLA interference and recover damages against the employer.

On the other hand, the statute's purpose is not implicated in the least if an employee's absence permits her employer to discover past professional transgressions that then lead to an adverse employment action against the employee. In such a situation, the employer is motivated not by the taking of the leave itself, but rather by prior deficiencies, that, whenever they were discovered, would have prompted demotion or discharge whether or not the employee took FMLA leave.

The court further held that the employee's retaliation claim must be analyzed using the traditional "burden shifting" analysis applicable in discrimination cases under Title VII of the Civil Rights Act of 1964. Accordingly, and assuming that the employee could articulate a prima facie case of retaliation, the employer's burden is to offer a non-retaliatory reason for the adverse action (in this case, the employee's poor job performance). The burden then falls on the employee to prove that the employer's reasons were pretextual and to prove that the employer had a retaliatory motive. Schaaf was unable to meet that burden.

The *Schaaf* case should be reassuring to employers who are concerned that they must ignore employee performance problems discovered during a period of absence. However, it should be noted that the employer in Schaaf was able to evidence clearly that its actions were based on new information discovered while the employee was on leave. If an employer is unable to evidence newly acquired evidence, or if the interim replacement's performance simply causes the employer to take a harsher view of previously known performance problems, this may not be sufficient to avoid FMLA claims.

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