FMLA Leave is Like a Hot Potato – Handle with Care or You Might Get Burned: The Message of the Culinary Institute Decision

Barbara E. Hoey

March 25, 2016

Much has been written about the Second Circuit's recent decision, finding that a Director of Human Resources at the Culinary Institute of America ("CIA") was **individually** liable as an "employer" for FMLA interference and retaliation. *Graziadio v. Culinary Institute of America, et al.*, No. 15-888-cv (2d Cir. Mar. 17, 2016). I agree this conclusion is noteworthy. However, the decision also reinstated the FMLA suit against the CIA, so it should send a loud message to all employers - not just HR directors - about how the conclusion of a FMLA leave should and should not be handled.

- **Like a hot potato just coming out of the oven, handle the return to work after FMLA leave with kid gloves, or you too can get burned.**

What is significant about the *Graziadio* decision is the facts ***were not*** "extraordinary", in that the HR Director was not accused of yelling or cursing or any similar abusive or "shocking" behavior.

Cutting to the core of the case, it appears that the HR Director made it extremely difficult for plaintiff to return to work, claiming that plaintiff had not submitted "sufficient" medical paperwork to document the need for her FMLA leave. This dispute deteriorated into a protracted email "battle", then a "standoff", where the HR Director "refused" to communicate with the employee via email any longer and then demanded a meeting. The meeting was never scheduled. Predictably, the employee then hired a lawyer and – you know how the story ends – not well. The employee never came back to work, and was ultimately fired for job abandonment.

The Second Circuit clearly did not like the way this transpired. Those with experience in these things know that it is highly likely that both parties (the employee and the HR Director) each bore some fault for this breakdown. However, it was the employee who ultimately was harmed by losing her job,

and the Court clearly felt sympathy for her.

Reading between the lines, the Court was sending a message which all employers should hear: that companies should not play games with employees, should be transparent and fair when handling a return-to-work after a FMLA leave and, ultimately, should not place artificial roadblocks in the way of an employee who – at least on paper – claims that they want to return to work.

Read on….

The Facts

Plaintiff Cathleen Graziadio was out a lot in 2012. She first took FMLA time off that spring to care for one son who had diabetes. Then, just one week after returning from that first FMLA leave, another son broke his leg and she had to be out to care for him. It was the return from that second leave which became a problem.

According to the decision, plaintiff notified her manager she was ready to return, on a schedule of 3 days per week. The HR Director, Shaynan Garrioch, then stepped in and began corresponding with Graziadio via email, claiming the medical documentation she had submitted to support her FMLA leave was not sufficient.

Graziadio asked more than once what documentation HR was looking for, and never got a clear response. After **many** emails, HR told Graziadio it "was not their obligation to explain what was missing from the paperwork…" The HR Director then told Graziadio she would not communicate via email any longer and to come in for a meeting. After many more emails back and forth about setting a date for the meeting, it just never happened.

Graziadio then retained a lawyer, who told the company (again) that Ms. Graziadio was "ready to return to work." Again, the HR Director insisted Graziadio could return, but only **if** her FMLA paperwork was "sufficient." After more emails and letters over this paperwork dispute, Ms. Graziadio did not come back.

Ultimately, the CEO made the decision to fire Ms. Graziadio for job abandonment.

The Decision

An individual can only be liable under the FMLA if she is an "employer" under the Statute. Courts have been split as to whether an individual person can fit that definition.

A. Why was the HR Director, Ms. Garrioch, found to be the "employer" here?

For the first time, the Second Circuit used the "economic realities" test, normally used in FLSA litigation, to conclude that the HR Director was liable as the "employer." Two facts were pivotal in reaching that conclusion:

- First, the court found that Human Resources – Ms. Garrioch's department – controlled "all aspects" of plaintiff's return to work after the FMLA leave. In other words, the court concluded that Garrioch in HR was calling the shots as to whether Graziadio's FMLA paperwork was "sufficient" and whether she could return to work.

"On the over-arching question of whether Garrioch controlled plaintiff's rights under the FMLA, there seems to be ample evidence to support the conclusion that she did…"

- Second, the court found that the HR Director played an “important role” in the termination decision. While the CEO made the ultimate decision, he had relied almost exclusively on what the HR Director told him.

What is implied from the decision is that the court believed that the HR Director was playing a bit of a “game” with plaintiff. The court detailed the multiple emails between Plaintiff and the HR Director, where HR kept insisting that Graziadio’s FMLA documentation was “not sufficient” – but then refused to explain why. It was clear the employee felt confused, and did not know what to do. She then retained a lawyer who again sent emails and letters to HR saying that his client was ready to go back to work. The HR Director then claimed Graziadio was “free to return”, but again only if the mysterious deficiency in the FMLA paperwork was corrected. Under those facts, the court concluded that Graziadio was justified is not returning to work.

While the HR Director was legally in the right in requesting the documents, plainly the manner in which she handled this exchange was not optimal.

B. What about her FMLA “interference” and retaliation claims?

In addition to finding that Ms. Garrioch was liable as an “employer,” the court also reinstated Plaintiff’s FMLA interference and retaliation claims against the CIA.

On the interference claim, the court below had found that Plaintiff couldn’t prevail on the inference claim because she had never submitted a sufficient medical certification to justify her second FMLA leave.

The Second Circuit disagreed – finding that Plaintiff had “attempted” to submit that paperwork. On that point, the Court found that Graziadio was not even required to submit FMLA paperwork, until this was “specifically requested by her employer.” (p. 17) This is not good law for employers in New York, as now any employee who has ‘attempted’ to submit FMLA paperwork has maybe complied with FMLA.

The Court also noted that, when asked for the paperwork, Defendant Garrioch violated FMLA by demanding its return in 7 days, when the statute gives an employee 15 days to submit initial FMLA paperwork.

Finally, the court was critical of Garrioch’s repeated refusal to answer Plaintiff when she asked “what paperwork” she needed to submit (p. 19). It was equally critical of the conclusion by the employer that Graziadio had abandoned her job. It noted that Graziadio had “attempted” to comply with the employer’s requests for documents. It also noted that HR Director Garrioch had cut off email communications and then never scheduled a meeting - despite the employee’s repeated emails offering to meet “whenever”. When the employer later said Graziadio could return to work, it was only if she had “appropriate” paperwork. The employee, however, thought she needed to have the meeting to submit the paperwork. It was like an endless maze of miscommunication, and the Court held that it was “dubious” to conclude that Graziadio in this scenario had abandoned her job – and there was evidence of retaliation.

In the end, the Court found that Plaintiff could go to a jury on her FMLA inference and retaliation claims. As to the retaliation claim, the Court held that the facts appeared to support plaintiff’s claim that CIA fired her because it was simply angry she had taken so much time off to care for her two sons. “We do not doubt that the jury could find that the Culinary Institute’s contention that Graziadio had abandoned her job was ‘false or implausible.”

The Takeaways

The FMLA is a difficult statute for employers and compliance can be challenging. It gives employees many rights and often leaves employers feeling frustrated.

That said, employers have to keep the big picture in mind. This case illustrates that conduct which may technically be "legal" may not be right or smart, and that employers have to be smart when dealing with vulnerable employees and FMLA leaves.

What you should take away from this case:

- Employees who are ill or disabled (or have family who are ill) are sympathetic plaintiffs. In a word, **"be nice"** when you correspond with employees via email about their leave. Remember, ***today's email could be tomorrow's exhibit***.
- If an employee asks for information or clarification, **answer their questions** in a clear and simple manner. Remember, if the employee is "attempting" to submit FMLA paperwork, the Second Circuit may well side with that employee.
- If you suspect that too much time off has been taken, **only act based on facts**. If the employee or family member had a serious health condition, it is likely the time off was protected by FMLA. Bite your tongue, and let them come back to work. You can look for evidence of FMLA fraud or abuse later and if you find it, you can discipline the employee, but tread carefully in this area. Again, act based on facts and not suspicions.
- Remember that, as a general matter, the FMLA does not require an employee who is out due to the illness of a family member to prove that they are the nurse. It is enough if a doctor certifies that the family member has the serious health condition, and that your employee was needed for support.
- The employer should avoid arbitrary deadlines and threats and should generally not "cut off" or "refuse" to communicate with an employee. Keep the dialogue going, be reasonable about deadlines, and again, be clear about what is expected.
- If an employee states, in writing, they want to return to work (and are physically able to do so), my advice would be **let them come back** and clear up the "paperwork" later. Of course, this assumes you have a doctor's note that clears the employee to work – which in Graziadio's case was not an issue as Plaintiff was not out due to her own illness. Err on the side of allowing the employee to come back to work.

The Message: Be Careful with FMLA

Remember – **your FMLA-protected employee is a hot potato.** Before you terminate an employee who was on FMLA leave, put on your oven mitts and make sure you have exhausted all other options.

FMLA compliance is a challenge. Employers always must keep in mind that the law presumes that an employee has a "right" to their job back. Thus, while the employer may be correct to demand sufficient documentation from the employee, to terminate an employee over a dispute about that documentation is a risky proposition.