

Employee Terminated Before Becoming Eligible for FMLA Leave May Have a Cause of Action Under the FMLA

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Do the Family and Medical Leave Act (FMLA) protect a request for FMLA leave by an employee who is not yet eligible? This question recently was considered and answered in the affirmative by the Court of Appeals for the Eleventh Circuit, which has jurisdiction over federal cases originating in Alabama, Florida and Georgia. The facts in the case, *Pereda v. Brookdale Senior Living Communities, Inc.*, were quite simple. The plaintiff, Ms. Pereda, requested FMLA leave in June 2009, which was to be taken after the birth of her child in or around late November of 2009. Soon after advising her employer of the pregnancy, Ms. Pereda allegedly experienced offensive and harassing conduct from her employer and, after being put on a performance improvement plan, was terminated in September of 2009. It was undisputed that at the time she requested leave and on the date of her termination, Ms. Pereda was not yet eligible for FMLA protection because she had not worked the requisite time period and had not yet experienced the triggering event of the birth of her child. It was equally undisputed that had she not been terminated, Ms. Pereda would have been entitled to FMLA protection by the time she gave birth and began her requested leave.

Under the FMLA, employees may assert two types of claims – “interference,” where an employer allegedly denies or interferes with an employee’s rights under the FMLA; and “retaliation,” where an employer allegedly discriminates against an employee for engaging in FMLA protected activity. Ms. Pereda asserted each of these claims against her employer, and the court recognized the legitimacy of both of them in its decision.

Noting that the FMLA requires advance notice to the employer of any foreseeable future leave, the court first found that the FMLA regulatory scheme necessarily protected pre-eligible employees from interference prior to the occurrence of the triggering event, such as the birth of a child. In recognizing that Ms. Pereda had a legitimate interference claim against her employer, the court stated that

“without remedy, the advanced notice requirement becomes a trap for newer employees and extends to employers a significant exemption from liability.”

In light of its conclusion that the FMLA protects a pre-eligibility request for post-eligibility maternity leave, the court also found that Ms. Pereda had stated a cause of action for FMLA retaliation. In other words, Ms. Pereda was engaged in statutorily protected activity when she discussed the FMLA leave with her employer.

The practical impact of the decision in Pereda is this – even if an employee is not eligible at the time he or she requests FMLA leave, the FMLA may still protect the employee from interference with the right to take the leave once he or she is eligible, and from retaliation for having made the request. All employers – whether located in the Eleventh Circuit or elsewhere – should be aware that any employee who announces a future need for FMLA leave prior to becoming eligible for it may be protected by the FMLA if it appears likely the employee will be eligible by the time the leave is scheduled to begin. Further, when assessing an employee’s eligibility for FMLA leave, employers should make their decision based on the date the leave is to begin, rather than as of the date of the request.



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