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Award of Front Pay in FMLA Case Too Speculative Where Employee Never Worked in New Position and Employer Substantially Changed its Operations

In *Dollar v. Smithway Motor Xpress Inc., et al.*, No. 11-2093 (8th Cir. Mar. 27, 2013), the U.S. Court of Appeals for the Eight Circuit found the district court abused its discretion in awarding front pay for a period of ten years in the amount of more than $135,000 for a Family and Medical Leave Act ("FMLA") violation.

While working as a driver manager, the plaintiff suffered from depression and missed work periodically. The plaintiff's supervisor and the human resources department began to look for a position that would be a better fit for the plaintiff. The plaintiff's depression took a turn for the worse, and she notified her supervisor that she would not be at work. A few weeks later, an executive in the human resources department told the plaintiff that she was expected to return to work later that month in a new position, as a driver recruiter.

When the plaintiff was unable to return to work by the date expected, the employer refused to hold the driver recruiter position for her. The plaintiff asked if she was terminated, and a supervisor answered in the affirmative. Two years later, the plaintiff sued her employer for FMLA interference and retaliation. After a bench trial, the district court found that the employee had in fact been transferred to the driver recruiter position before her termination. The court rejected the plaintiff's retaliation claim but held that the employer interfered with her FMLA rights by terminating her with knowledge of her serious medical condition.

The employer-defendants appealed, arguing the district court erred as a matter of law and fact in holding the plaintiff was entitled to the position of driver recruiter because she had never held that position. Additionally, the defendants argued that the district court erred in awarding damages because the plaintiff failed to mitigate her damages, and erred in awarding front pay because the employer had ceased business activities before the trial.

The appellate court noted that, unlike the Americans with Disabilities Act, the FMLA does not impose a duty of reasonable accommodation. Under the FMLA, a qualifying employer must grant a

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qualifying employee twelve weeks of leave in a twelve month period if the employee suffers from "a serious health condition that makes the employee unable to perform the functions of the position of such employee." 29 U.S.C. § 2612(a)(1)(D). Additionally, an employer must reinstate the employee to his or her original position or to an "equivalent position with equivalent employment benefits, pay, and other terms and conditions of employment," 29 U.S.C. § 2614(a)(1)(B), after any such period of leave. On appeal, the court found that it was not necessary to decide the question of whether the driver recruiter position was an "equivalent" position because the district court expressly found the plaintiff had been transferred prior to her termination.

The appellate court affirmed the district court's finding that the defendants' failure to plead the affirmative defense of failure to mitigate damages resulted in a waiver of the defense. Additionally, the appellate court stated that mitigation of damages requires reasonable efforts and does not require a plaintiff to accept a particular position.

On the issue of front pay, the court noted that front pay is an equitable remedy, and consideration of all circumstances of a case is appropriate to assess an amount. The court acknowledged that front pay awards always are speculative, because the awards are founded on assumptions about a plaintiff's longevity, the likely duration of future employment, and the continued viability of the employer, among other factors. Given the "peculiar facts" in this case, including that the plaintiff never worked in the new position and that the defendants substantially changed their operations through a corporate restructuring, the court found the award of front pay was "overly speculative" and vacated the award.

~ Laurie Weinstein, Berger Singerman LLP

Section Calendar

MAY 14, 2013
Audio Webcast
- **Immigration Law Issues for the Employment Lawyer (1574R)**

JUNE 4, 2013
Audio Webcast
- **E-Discovery (1575R)**

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