

DISCRIMINATION—DISABILITY—D.N.J.: Jury to decide if medical practice's discharge of director one week before FMLA eligibility was pretext

By Thomas K. Lauletta, J.D.

The practice contended that it had fired her for failure to timely provide a return-to-work date, although it failed to inform her the failure to do so would result in termination.

Claims that a clinical operations director for a medical practice was fired for seeking FMLA leave one week prior to becoming eligible and as a result of her neurological disability will avoid summary judgment, the federal district court in New Jersey has ruled. The director presented sufficient evidentiary support that the medical practice violated FMLA provisions prohibiting retaliation and interference with FMLA rights—she requested FMLA information multiple times while she was on pre-eligibility medical leave and her request was ignored. Her claims that the practice violated New Jersey Law Against Discrimination (NJLAD) disability bias and reasonable accommodation provisions also advanced because it was disputed whether the practice actually required in-person attendance as an essential job function, given that she oversaw six sites, and she had clearly requested leave and work from home as an accommodation ([*Schlater v. Arthritis, Rheumatic & Back Disease Associates, P.A.*](#), Hillman, N.).

Neurological disability. The Clinical Operations Director at a rheumatology practice in New Jersey began her employment in February 2017. By January 2018, the practice's CEO and its Director of Human Resources and others were aware that the director suffered from a debilitating neurological condition that began to worsen in the fall of 2017; in fact, one of the practice's physicians treated the director for her illness. This condition prevented her from standing, sitting down, or walking for long periods of time and led to her walking with a cane. During this time, the employee began working from home on certain days and coming to work earlier and leaving earlier than the practice's standard office hours so as to avoid getting stuck in traffic.

No more work from home. On January 9, 2018, the CEO informed the director that going forward she would no longer be allowed to work from home or work any adjusted hours; instead, she was required to be in the office during normal working hours, and she would have to take vacation days for any days that she was unable to do so. The CEO's stated rationale was that the position of Director of Operations could not be performed remotely.

Request for medical leave and FMLA information. Three weeks later the director requested medical leave by email to the HR director, attaching a doctor's note excusing the director from work "indefinitely" pending evaluation of her progressive medical condition with a neurosurgeon. Following a referral to another neurological specialist, the director specifically requested from the HR director information to request an extended leave under the FMLA.

Return-to-work date requested. The HR director ignored the director's request for FMLA leave information and informed her that the practice did not offer extended leave and she had no paid time off remaining. The HR director's email further requested, for the first time, that the director provide an expected return-to-work date by six days later (February 19, 2018), but it did not state that failure to do so could result in termination. Although the director replied reiterating her request for FMLA information, it was again ignored, yet information on state benefits was provided. The director contacted HR again three days later, informing the practice that her physicians were still in the process of evaluating her.

Termination. On February 20, the CEO informed the director she had been terminated for failing to provide a return date by the deadline provided by the HR director. Had the employee worked for one more week, she would have been employed for one year and qualified for 12 weeks leave under the FMLA.

FMLA retaliation claim. Addressing the practice's motion for summary judgment, the court first concluded that the director's evidence was sufficient to create an inference of causation between her FMLA leave request and her termination. The court noted that the director was terminated six days after first expressing her intent to request FMLA leave and her termination came one week before the date she would have become eligible for 12 weeks of FMLA-protected leave. The practice's alleged legitimate nondiscriminatory reason for her termination was that she had failed to provide it with her expected return date.

Pretext. Unconvinced, the court found the director's evidence was sufficient to allow a reasonable factfinder to find that the employer's stated nondiscriminatory reason was a pretext for discrimination. Among the evidence supporting pretext was the "unduly suggestive timing of her termination" but also the fact that the practice did not request a return-to-work date until immediately after the director first raised the possibility of taking FMLA leave. It never mentioned that the failure to provide a return date by the deadline could result in termination.

FMLA interference claim. As for the FMLA interference claim, the practice contended the director was not eligible for FMLA leave because she had not been employed for a full year. The court rejected this argument, noting precedent that a pre-eligible employee may raise an interference claim if the employer discharges them in order to avoid providing FMLA leave once that employee becomes eligible.

Also rejected was the practice's argument that the director's termination was unrelated to interference with her FMLA rights because she failed to provide a return-to-work date by the deadline it set. Finding a genuine dispute of material fact as to the actual reason for the firing. Accordingly, the court denied summary judgment on the FMLA interference claim.

NJLAD discrimination claim. The director also claimed that she was fired because of her disability in violation of the NJLAD anti-discrimination rules; in response, the practice argued she failed to show that she was qualified because she could not be onsite during standard office hours. Although it would give "some weight" to the practice's judgment as to essential job functions, the court found contradictory evidence sufficient to show a genuine dispute of fact on this issue. Notably, the original job description for her position drafted by the practice did not mention any requirement that she be onsite during all business hours; additionally, the director oversaw operations and employees at six different of the practice's sites, so part of her duties necessarily were done remotely.

Although the practice again offered the director's failure to provide a return date as a legitimate nondiscriminatory reason for her firing, the court again found sufficient evidence of a genuine issue of material fact as to pretext. Accordingly, summary judgment on the NJLAD discrimination claim was denied.

NJLAD failure to accommodate claim. The practice's sole argument that it did not fail to accommodate the director's disability was that she never requested such an accommodation. An accommodation request under NJLAD may be made orally or in writing and does not have to specifically use the words "reasonable accommodation." She contended that she expressed her need for accommodation: (1) by requesting an extended leave of absence beyond the two weeks she had taken at the time of her request, and (2) by requesting the ability to work from home part-time when her disability worsened. Agreeing that the employee had clearly expressed a desire for accommodation or assistance for her disability, the court denied summary judgment on the failure to accommodate claim.

NJLAD retaliation claim. Citing its analysis with respect to the director's FMLA retaliation claim, the court further concluded that there were material factual disputes regarding both causation and pretext, and denied summary judgment on this claim as well.

The case is [No. 1:18-cv-09778-NLH-KMW](#).

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