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## Intervening FMLA Leave Suspends Performance Improvement Plans

The Family and Medical Leave Act of 1993 (FMLA) has proven to be an important labor law providing unpaid leave to employees in various circumstances. It requires that employers not interfere with employees' exercise of their rights or retaliate against them for doing so, but on the other hand it does not require employers to keep employees who would have been terminated regardless of their FMLA leave. But what about the situation where an employee has been given a deadline within which to improve his performance or be fired that is then derailed by FMLA leave? The Eleventh Circuit Court of Appeals recently ruled on an important case dealing with this very scenario.

In *Martin v. Brevard County Schools*, the employee appealed the District Court's grant of summary judgment in favor of the employer on claims of interference with FMLA rights and retaliation for taking FMLA leave. In *Martin*, the employee was a payroll supervisor who worked for the employer on a contract basis with the last contract expiring on June 30, 2004. After a less-than-stellar performance review, the employee's supervisor presented the employee with an improvement plan affording the employee an opportunity "to demonstrate significant progress" by June 1, 2004. This plan was presented to the employee on April 19, 2004.

In late 2003, the employee's daughter, a member of the Army Reserves, had a daughter—the employee's granddaughter. On April 29, 2004, the employee submitted a request for 12 weeks of FMLA leave to care for his granddaughter because his daughter

was being deployed overseas. The employee's request specifically stated that he was to have day-to-day responsibility for caring for his granddaughter and that he stood "in loco parentis." The employee's supervisor approved the request through the term of the employee's contract, June 30, 2004. Notably, the employee's FMLA leave overlapped with the period set out in his improvement plan. On May 3, the employee was asked to sign a statement reflecting the fact that his employment contract would not be renewed if the FMLA leave prevented him from fulfilling his improvement plan. The employee refused to sign the statement and began his FMLA leave on May 7, 2004. The employee's daughter was never deployed, but the employee assisted with his granddaughter's care when his daughter was at home and had full responsibility for his granddaughter when his daughter was away from the house. In addition, the employee provided financial support to his daughter and granddaughter during this time. On June 21, 2004, the employee was informed that his contract would not be renewed for failure to complete his improvement plan.

The Court stated, "To prove FMLA interference, an employee must demonstrate that he was denied a benefit to which he was entitled under the FMLA." Furthermore, the Court noted that an employer's motive is irrelevant. Under the FMLA, an employee has the right to be reinstated to his previous position or to an equivalent position. However, if the employer can prove that the

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## Intervening FMLA Leave Suspends Performance Improvement Plans

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employee would have been discharged had he not been on FMLA leave, the employer is not required to reinstate the employee. The Court held that summary judgment was improper in this case because it was unclear whether the employee would have been discharged if he had not taken FMLA leave. This rationale makes some sense because it is impossible for an employee to complete a performance improvement plan while on FMLA leave without performing some work.

Next, the Court considered the retaliation claim. To prove FMLA retaliation, an employee must show that his employer *intentionally* discriminated against him for exercising an FMLA right. FMLA retaliation claims are unlike FMLA interference claims for two reasons; the employee, rather than the employer, bears the burden of proof and secondly, the employer's motive is important. If the employee cannot provide direct evidence that the employer had a retaliatory or discriminatory motive, the Court uses a method called burden-shifting. Under burden-shifting in an FMLA case, the employee must show that he (1) engaged in statutorily protected activity, (2) he suffered an adverse employment decision, and (3) the decision was causally related to the protected activity. Next, the employer is given an opportunity to show a legitimate reason for the adverse action. Finally, the employee is given an opportunity to show that the employer's stated reason was not the true reason for the adverse action.

In *Martin*, the employer only challenged the causal relationship between the adverse action and the FMLA leave. However, two facts led the Court to hold that summary judgment was improper; first, the Court found it important that the employee was terminated while on FMLA leave. Secondly, the Court noted that the employer previously warned the employee of the ramifications of taking FMLA leave. Consequently, the Court held that the only way

the employer could have won on summary judgment was to provide a legitimate reason for the termination that no reasonable jury could find untrue. Because the Court held that the employer had not met this "high standard," the case was sent back to the District Court for trial.

The Court noted that "in loco parentis" has been defined by the Department of Labor, for the purposes of the FMLA, as a person with the "day-to-day responsibility to care for and financially support a child." Under the facts of this case, the Court held that a reasonable jury could find that the employee stood in loco parentis to his granddaughter even though his daughter was never deployed. The employee argued that the employer should not be allowed to challenge the entitlement to FMLA leave because the request was originally approved. However, the Court declined to follow other jurisdictions that agreed with the employee.

Employers should realize that requiring employees to fulfill performance improvement plans while on FMLA leave is tantamount to not permitting the employee the leave in the first place. The wiser course would be to suspend the plan while the employee is on leave then reinstate it upon the employee's return leaving any negative consequences to occur at the end of the plan. Another lesson here arises from the rare situation where an employee is not the biological parent of the child creating the need for leave but instead provides the household and support for that child and thus stands *in loco parentis* to the child—such as in this case where a family member is raising the child. Employers should be careful not to reject leave simply because the person is not the biological parent.

The Eleventh Circuit covers Alabama, Florida, and Georgia. Questions about claims related to FMLA leave may be directed to Brooke Nixon at (205) 633-0236 or [bnixon@tannerguin.com](mailto:bnixon@tannerguin.com).



*“Employers should be careful not to reject leave simply because the person is not the biological parent.”*



## Non-Work Related Discriminatory Comments Fall Short in Title VII Claim

Racially offensive and discriminatory comments are always inappropriate, but in considering whether an employer should be liable for them one has to make a distinction between those for which the employer should be responsible and those that an employee simply encounters in everyday life outside of work. Sometimes that distinction becomes difficult as

was the case in *Butler v. Alabama Dept. of Transportation* where the plaintiff's claims of discrimination and retaliation were based substantially upon comments made by a co-worker after a car wreck that happened during lunch.

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## Non-Work Related Discriminatory Comments Fall Short in Title VII Claim

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In a retaliation claim an employee must show that she had an objectively reasonable belief that the complained of behavior was an unlawful employment practice. Additionally, in a discrimination claim, the employee must show that she suffered a serious and material change in the terms, conditions, or privileges of employment. In *Butler*, the Eleventh Circuit Court of Appeals held that the plaintiff failed to prove either of these elements.

In January 2005, the plaintiff Butler, who is black, was traveling with a white co-worker to lunch when the co-worker's truck crashed with a vehicle driven by a black male. According to the plaintiff, immediately after the accident the co-worker made two vile racially offensive statements about the other driver in the plaintiff's presence. Three months after the accident the plaintiff informed her supervisor about the offensive comments. Around the same time, the employee and the same co-worker got into an argument at work, and the employee received a written reprimand for her part of the confrontation. Sometime later in April 2005, all employees were told to begin reporting to work at 7:00 a.m. The plaintiff complied with this policy while the co-worker did not.

On April 12, 2005, the plaintiff received an unfavorable annual evaluation. The next day she filed a grievance arguing that the adverse report was in retaliation for reporting her co-worker's statements. After her evaluation several other bad things happened to her including losing previously approved leave, receiving reprimands for failing to correctly complete a training form, absenteeism, and failing to follow call-in procedures for unscheduled absences. Despite all of these disciplinary actions, she was not suspended or demoted.

In the fall of 2005, the plaintiff applied for and was given disability retirement. Despite her retirement, employee filed a lawsuit against her employer. She alleged that her employer retaliated against her for reporting her co-worker's offensive statements and that she was discriminated against because of her race in violation of Title VII of the Civil Rights Act of 1964 and Section 1981. A jury awarded the plaintiff \$200,000 in damages, and the employer appealed.

In addressing the retaliation claim, the Eleventh Circuit noted that the allegation relied solely on

the plaintiff's assertion that the retaliation was a result of reporting her co-worker's offensive statements. The Court pointed out that to prevail on a retaliation claim an employee must prove that it was "objectively reasonable" for her to believe that the co-worker's comments amounted to an unlawful employment practice. The Court found her belief objectively unreasonable. It pointed out that the only offensive comments made were spoken away from work after a traffic accident. The Court observed that even though the comments were inappropriate, "not every uncalled for, ugly, racist statement by a co-worker is an unlawful employment practice."

The Court next turned to plaintiff's discrimination claim. To prevail on this claim, the Court said that an employee must show that she suffered a "serious and material change in the terms, conditions, or privileges of employment." The Court examined all of the plaintiff's complaints to see if there was evidence of discrimination. It found that the employer's requirement that the plaintiff perform manual labor was within her job description. Additionally, requiring the plaintiff to be at work at 7:00 a.m. was not discriminatory as the work-day started at that time. Although her co-worker was not disciplined for showing up late to work, the Court noted that the plaintiff did not present any evidence that she, and not her co-worker, would have been disciplined for showing up late. Finally, the Court noted that the plaintiff's written reprimands were not discriminatory as there were valid reasons for them. It stated, "the protections of Title VII simply do not extend to everything that makes an employee unhappy."

This case does not signify that a co-worker's comments made away from work can never create an unlawful employment practice. In fact, had these comments been about work-related matters and not an offsite wreck with a third party, a much different case would have been presented. As such, employers should still be vigilant about all potentially discriminatory comments between employees whether at work or not and should not simply dismiss comments that occur away from work—especially if they are about work-related matters. The Eleventh Circuit covers Alabama, Florida, and Georgia. If you have any questions about retaliation or discrimination claims, please contact Tom Scroggins at (205) 633-0227 or [tscroggins@tannerguin.com](mailto:tscroggins@tannerguin.com).

*"...an employee must show that she suffered a 'serious and material change in the terms, conditions, or privileges of employment.'"*



*"...had these comments been about work-related matters and not an offsite wreck with a third party, a much different case would have been presented."*

## New Final Family and Medical Leave Act Regulations Issued

The Department of Labor engaged in an extensive review of the Family and Medical Leave Act (FMLA) before proposing changes in February 2008. After issuing its Notice of Proposed Rulemaking, the Department reviewed over 4,600 public comments before issuing final regulations on November 17, 2008. The final regulations went into effect on January 16, 2009, clarify various aspects of the current law, and coordinate the regulations with 2008 statutory expansions to cover leave related to a family member's military service.

The following are some of the highlights from the final regulations:

- The "serious health condition" requirement is met if the employee certifies that he/she has visited a doctor at least twice per year for that condition. The two visits must occur within 30 days of the beginning of the period of incapacity and the first visit to the health care provider must take place within seven days of the first day of incapacity.
  - Absent "unusual circumstances," employees are responsible for following their employer's call-in policy when they plan to miss work.
  - An employer may require "fitness-for-duty" evaluations to ensure that an employee who took FMLA leave is fit to return to his/her specific job if doing the job raises a significant risk of harm to the employee or to others.
  - Time spent on "light duty" does not count against an employee's entitlement to FMLA leave.
  - An employer may consider FMLA absences in determining bonuses and other incentive rewards.
  - Employers are required to provide employees with a general notice about the FMLA, an eligibility notice, a rights and responsibilities notice, and a designation notice.
- All forms of paid leave offered by an employer are treated the same, regardless of the type of leave substituted (including generic "paid time off").
  - Employees may voluntarily settle or release their FMLA claims without court or Department of Labor approval.
  - Employees may take up to 26 weeks of unpaid leave in a single 12-month period to provide care to a military service member wounded in the line of duty. The service member can be a spouse, son, daughter, parent, or next of kin.
  - Employees may take up to 12 weeks of unpaid leave in a single 12-month period to deal with "qualifying exigencies" arising from a spouse, son, daughter, or parent who is on active duty or is called to active duty. "Qualifying exigencies" include (1) short notice deployment; (2) military events and related activities; (3) childcare and school activities; (4) financial and legal arrangements; (5) counseling; (6) rest and recuperation; (7) post-deployment activities; and (8) additional activities. The "additional activities" category allows leave to address other events which arise out of the covered military member's active duty or call to active duty status provided that the employer and employee agree that such leave shall qualify as an exigency, and agree to both the timing and duration of such leave.

The FMLA has long been a source of conflict between employers and employees due to less than clear requirements for either side, but these revised regulations are intended to clarify issues and adapt to new statutory changes. With 201 pages of commentary and new regulations, employers have a lot to digest. The effective date was January 19, 2009. Questions about claims related to FMLA leave may be directed to Brooke Nixon at (205) 633-0236 or [bnixon@tannerguin.com](mailto:bnixon@tannerguin.com).



*"The FMLA has long been a source of conflict between employers and employees due to less than clear requirements for either side, but these revised regulations are intended to clarify issues and adapt to new statutory changes."*

## Immigration Law Update—More Changes on the Horizon

Employers must remain diligent to keep up with changes in federal and state immigration laws. These ever-evolving laws can subject the unwary employer to significant penalties and fines, including criminal penalties and jail time.

As many employers are aware, U.S. Immigration and Customs Enforcement (ICE) agents have dramatically stepped up efforts over the last couple of years to raid worksites, detain (and

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## Immigration Law Update—More Changes on the Horizon

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deport) illegal workers, and criminally prosecute company managers and owners who ignore their responsibilities under the immigration laws. President Barack Obama has indicated that comprehensive immigration reform is a top priority of his administration, and he has not yet indicated that he intends to reverse the workplace raids policy of the Bush Administration. Now more than ever, it is crucial that employers ensure their policies and procedures are in compliance with the applicable laws.

Recent changes include the issuance of (yet another) updated Form I-9 that changes the lists of acceptable documents an employee may present to prove his identity and employment authorization. The newest version of the Form I-9 will be available and required on February 2, 2009. This is the second significant revision of the Form I-9 in just over a year, and employers should check the version date to confirm they are using the correct form.

As you may be aware, the Bush administration issued regulations that will require most federal contractors and subcontractors to register with the federal government's electronic employment verification system, E-Verify. However, implementation of the regulations has been postponed until at least February 20, 2009. Several pro-business groups, including the Society for Human Resource Management (SHRM) and the U.S. Chamber of Commerce, filed a lawsuit contesting the new regulations, and the parties have agreed to delay enforcement of the new rules to allow the federal courts an opportunity to review the merits of SHRM's lawsuit. If and when implemented, the new rules will require most federal contractors and their subcontractors to

register with E-Verify and submit information to verify the employment authorization for all existing and new employees.

The "no-match regulations" that have been pending since originally proposed in June 2006 are still subject to a federal court injunction pending the outcome of a lawsuit filed by labor unions, employer groups, and pro-immigrant groups. As you may recall, these regulations set out the procedures employers must follow when they receive "no-match" letters from the Social Security Administration (SSA) or the Department of Homeland Security (DHS). The DHS attempted to bypass the injunction when it released a set of proposed supplemental rules in March 2008, but the federal court denied the request by DHS to lift the injunction. At the current time, the regulations are not yet effective, but employers should still be sure they have a policy in place for addressing "no-match" letters, as the letters may not simply be ignored.

State legislatures also continue to address immigration issues in the absence of federal overhaul. New laws affecting immigration rights and obligations were enacted in 2008 in over 40 states, including laws addressing immigrant driver's licenses, employer compliance, and law enforcement. Many states also require employers and contractors in their states to register with E-Verify. Companies should check the applicable laws in the states in which they operate to avoid running afoul of some of the newly implemented laws.

If you need assistance in reviewing immigration law compliance requirements, or if you would like more information regarding employer obligations when registering with the E-Verify program, please contact Carol Armstrong at (205) 633-0268 or [carmstrong@tannerguin.com](mailto:carmstrong@tannerguin.com).



*“Now more than ever, it is crucial that employers ensure their policies and procedures are in compliance with the applicable laws.”*



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