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Eleventh Circuit Interprets "Prospective Rights" Under the FMLA

In *Paylor v. Hartford Fire Insurance Company*, the Eleventh Circuit—for the first time—interpreted the meaning of "prospective rights" under the Family Medical Leave Act of 1993, 29 U.S.C. §§ 2601, *et seq.* ("FMLA") and concluded that the phrase does not include claims for past conduct by an employer.[1]

From January 2008 through September 2009, Paylor requested and was given 390 hours of FMLA leave. Shortly thereafter, Paylor requested additional FMLA leave. In response, Hartford sent Paylor an e-mail with several attachments, including various forms for her FMLA request. There was a dispute as to whether Hartford actually granted the additional FMLA leave.

Paylor's last performance review was on September 11, 2009, and the review included a performance warning, outlining the steps she needed to undertake to keep her job. Shortly thereafter, Paylor had a meeting with her supervisors where she was offered the ultimatum that subsequently formed the basis of her lawsuit: accept a one-time offer of thirteen weeks of severance benefits in exchange for signing a severance agreement waiving her rights under the FMLA, or reject the severance benefits and be subjected to a performance improvement plan. Ultimately, Paylor signed the severance agreement.

Paylor filed suit against Hartford alleging interference and retaliation under the FMLA. Hartford asserted that Paylor's claims were barred by her execution of the severance agreement, and the company moved for summary judgment on that defense. In response, Paylor argued that the severance agreement was unenforceable as to her FMLA claims because 29 C.F.R. § 825.220(d) prohibits waiver of "prospective rights" under the FMLA. In support of this proposition, Paylor argued that her outstanding request for FMLA leave was a prospective right, which could not be waived by the severance agreement absent court or Department of Labor approval. The district court disagreed that the right was prospective, reasoning that the alleged unlawful conduct (i.e., the ultimatum) occurred before Paylor signed the severance agreement. Noting that the Eleventh Circuit had not addressed the issue of a release of FMLA claims based on an employer's past conduct, the district court nonetheless entered summary judgment in favor of Hartford.[2]

The sole question before the Eleventh Circuit was whether the severance agreement constituted a valid waiver of Paylor's rights under the FMLA. Paylor made three arguments on appeal to support her position that the waiver was unenforceable. One argument, considered and rejected by the court, was that she did not sign the severance agreement knowingly and voluntarily. Another argument, dismissed by the Eleventh Circuit out of hand because not raised at the district court level, was that the severance agreement was invalid as contrary to public policy. A third argument—that the severance agreement was invalid insofar as it released "prospective" rights under the FMLA—was the focus of the court's opinion and is therefore the focus of this article.

In addressing the issue, the Eleventh Circuit discussed the history of section 825.220(d). Prior to the 2009 amendment of section 825.220(d), the regulation did not include the word "prospective" and simply prohibited the waiver of "rights" under the FMLA.[3] Additionally, the Eleventh Circuit noted there was a split among circuit courts that had addressed waiver of FMLA rights. For example, the Fifth Circuit held that the pre-2009 regulation prohibited waiver of prospective rights only.[4] The Fourth Circuit, however, held that the pre-2009 regulation

prohibited waiver of both retrospective and prospective rights under the FMLA.[5] On rehearing, the Fourth Circuit confirmed that the DOL regulation prohibited waiver of both retrospective *and* prospective rights under the FMLA despite an assertion to the contrary by the Department of Labor in an amicus brief.[6]

In 2009, however, the Department of Labor amended section 825.220(d) to state that an employee may waive retrospective claims but *not* "prospective" claims, in accord with the earlier Fifth Circuit opinion. Two years later, the Fourth Circuit, in *Whiting v. Johns Hopkins Hospitals*, noted that the previous *Taylor* decisions were superseded by regulation.[7] Aligning itself with the Fourth Circuit, the Eleventh Circuit in *Paylor* held that an employee may waive FMLA claims based on past employer behavior, but he or she cannot waive prospective rights under the FMLA. Having so concluded, the Eleventh Circuit observed that the only issue left for it to decide was "the meaning of the word 'prospective' as it concerns FMLA rights, which is a question of first impression in our circuit."[8]

Paylor argued that "prospective rights" means unexercised rights under the FMLA. The appellate court rejected this argument as too broad, noting it would then be unlawful to fire *any* eligible employee who has a pending request for FMLA leave. The Eleventh Circuit ultimately defined "prospective rights" as "those allowing an employee to invoke FMLA protections at some unspecified time in the future."[9] Given this definition, the court then suggested as an example of a prohibited waiver of such rights a situation where an employer offers all new employees a one-time incentive in exchange for a waiver of all FMLA claims. The court expounded: "§ 825.220(d)'s prohibition of 'prospective' waiver means only that an employee may not waive FMLA rights, in advance, for violations of the statute that have yet to occur."[10]

Paylor's lawsuit asserted that Hartford interfered and retaliated against her FMLA request when Hartford provided Paylor with the ultimatum to accept the performance improvement plan or the severance agreement. Because those actions occurred prior to Paylor signing the severance agreement, the Eleventh Circuit concluded that she settled claims based on Hartford's past conduct. The Eleventh Circuit therefore affirmed summary judgment in favor of Hartford.

Although most of the pre-2009 regulation cases may no longer be active in the federal court dockets, the same may not be true in state court.[11] In that event, the defense should argue that the revision of the DOL regulation was only a "clarification" that may be applied retroactively.[12]

Finally, it is worth noting that the last section of the court's order—almost one-third of the opinion—takes both plaintiff's counsel and defense counsel (and, in fact, the larger bar) to task for "causing themselves, their clients, and the courts considerable time, expense and heartache" by not "paus[ing] to better identify the issues before diving into discovery" regarding a dispute that was "really very narrow."[13]

~ Carlo D. Marichal, Banker Lopez Gassler P.A.

Endnotes

1. *See Paylor v. Hartford Fire Ins. Co.*, 748 F.3d 1117 (11th Cir. 2014).
2. *Id.* (citing *Hollinger v. Hartford Fire & Cas. Ins. Group*, No. 6:11-cv-59-Orl-19TBS, ECF Doc. 57, at 20-21 (M.D. Fla. Dec. 10, 2012)).
3. *See id.* (citing 29 C.F.R. § 825.220(d) (2008)).
4. *Id.* (citing *Faris v. Williams WPC-I, Inc.*, 332 F.3d 316, 321 (5th Cir, 2003)).
5. *Id.* (citing *Taylor v. Progress Energy, Inc.*, 415 F.3d 364, 368 (4th Cir. 2005)).
6. *Id.* (citing *Taylor v. Progress Energy, Inc.*, 493 F.3d 454, 456 (4th Cir. 2007)).
7. *Whiting v. Johns Hopkins Hosp.*, 416 Fed. Appx. 312, 316 (4th Cir. 2011).
8. *Paylor*, 748 F.3d at 1123.
9. *Id.*
10. *Id.* at 1124.
11. A plaintiff can bring a suit in state court for alleged FMLA violations. *See, e.g., Patterson v. Browning's Pharmacy & Healthcare, Inc.*, 961 So. 2d 982 (Fla. 5th DCA 2007).
12. *See Whiting v. Johns Hopkins Hosp.*, 680 F. Supp. 2d 750 (D. Md. 2010) (applying the FMLA's "prospective rights" provision retroactively); *see also Heimmermann v. First Union Mtg. Corp.*, 305 F.3d 1257 (11th Cir. 2002) (distinguishing clarifications of law from implementing an entirely new law); *City of Pompano Beach v. Haggerty*, 530 So. 2d 1023 (Fla. 4th DCA 1988) (applying an ordinance retroactively where it was a mere clarification).
13. *Paylor*, 748 F.3d at 1125.