11th Circ. FMLA Ruling Deepens Divide Over Causation

By **Eric Baisden, Adam Primm and Lyndsay Flagg** (March 12, 2024)

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In a win for employers located in Florida, Georgia and Alabama, the U.S. Court of Appeals for the Eleventh Circuit recently concluded that retaliation claims brought under the Family and Medical Leave Act are subject to a but-for causation standard.

In so doing, the Eleventh Circuit not only heightened the burden of proof that employee-plaintiffs must meet in order to succeed on FMLA retaliation claims, but the decision deepened the divide among federal courts, where the correct causation standard has long been debated.

The plaintiff in Lapham v. Walgreen Co. was a long-time employee of Walgreens who had worked in several of its stores for over a decade.[1] Doris Lapham frequently used FMLA leave to care for her son, who had significant health issues and required full-time care.

Walgreens approved intermittent FMLA leave for Lapham on an annual basis between 2011 and 2015. Simultaneously, Lapham's performance fluctuated between a high score of 3.2/5.0, achieving expectations, and a low of 1.0/5.0, not achieving expectations.

When Lapham received a 2.3/5.0, partially achieving expectations, for 2016, Walgreens placed her on a 60-day performance improvement plan. Walgreens also issued a written warning to Lapham in November 2015 for violating company policy when she refused to assist with a store delivery.

In early 2017, Lapham applied for intermittent FMLA leave for the upcoming year. Walgreens management did not immediately approve her leave request or provide the necessary signatures for her FMLA paperwork.

Lapham complained to management on two occasions about Walgreens' delay in signing her leave paperwork. A co-worker reported that, during this time, Lapham instructed other employees not to perform the job duties assigned by the same managers who had delayed in signing her FMLA paperwork. Lapham denied the allegation, but Walgreens terminated her employment in April 2017 for insubordination and dishonesty.

Lapham brought a claim for FMLA retaliation, along with various others, against Walgreens in Florida state court, and the action was subsequently removed to the U.S. District Court for the Middle District of Florida.

At the summary judgment stage, the parties argued that different causation standards applied to the FMLA retaliation claim. Walgreens argued that Lapham could not succeed on her claim because she could not prove that she would not have been terminated but for her FMLA leave request and complaints about management's delay in approving her leave.

In contrast, Lapham argued that she needed only to show that her requests for leave and

complaints were a motivating factor in Walgreens' decision.

The difference between motivating factors and but-for causation is significant.

If a retaliation claim is subject to motivating-factor causation, then a plaintiff like Lapham need only show that her protected activity somehow contributed to the employer's adverse action against her.

Under this standard, a plaintiff can still prove her claim even if multiple factors contributed to the employer's decision, and those factors could be even more impactful than, or entirely unrelated to, her protected activity.

In contrast, retaliation claims subject to but-for causation require a much higher burden of proof. In Lapham, the Eleventh Circuit would eventually define but-for causation as the "straw that broke the camel's back."

To meet this burden, a court must look at a sequence of events and "change one thing at a time [to] see if the outcome changes." Thus, a plaintiff could only succeed on her claim if she shows that the adverse employment action against her would not have happened absent her protected activity.

The Middle District of Florida initially agreed with Lapham and denied summary judgment to Walgreens, holding that Lapham presented sufficient evidence that a jury could find her protected activity under the FMLA motivated her termination.

Walgreens filed a motion for reconsideration, requesting that the Middle District of Florida reevaluate its decision, applying but-for causation. In a surprising move, the court granted the motion and upended its earlier decision.

The court compared the language in the FMLA's retaliation provision to the language included in Title VII's retaliation provision and found that the language was comparable.

Accordingly, since Title VII retaliation claims are subject to but-for causation, as determined by the U.S. Supreme Court in University of Texas Southwestern Medical Center v. Nassar[2] in 2013, the Middle District of Florida determined that FMLA retaliation claims must also be subject to but-for causation.

Since Lapham could not prove that Walgreens would not have terminated her employment but for her protected activity, the court entered judgment in Walgreens' favor. Lapham appealed the decision to the Eleventh Circuit.

The Eleventh Circuit ultimately agreed with the district court's reconsidered decision. On Dec. 13, 2023, the court held that the proper standard for FMLA retaliation claims is but-for causation.

Like the lower court, the Eleventh Circuit analyzed the text of the FMLA's retaliation provision, which prohibits discrimination against an employee "for opposing any practice made unlawful by" the FMLA.[3]

Relying on Nassar, the Eleventh Circuit noted that but-for causation is the default standard in tort law, especially in the absence of any express "motivating factor" language in the statute.

The court concluded that the preposition "for" was the equivalent of "because of," such that the FMLA's retaliation provision, like Title VII, requires but-for causation.

Notably, the Eleventh Circuit disregarded guidance issued by the U.S. Department of Labor, which had opined that the FMLA retaliation claims were subject to negative-factor causation.

Negative-factor causation is similar to motivating-factor causation and would preclude employers from considering an employee's actions taken under the FMLA to be a negative factor while making employment decisions.

The Eleventh Circuit swiftly dispensed the DOL's guidance, holding that the language of the FMLA's retaliation provision was sufficiently clear that no agency guidance need be considered. In early February, the Eleventh Circuit denied Lapham's request for a rehearing.

With the Lapham decision, the Eleventh Circuit is the latest federal court to weigh in on the proper standard for FMLA retaliation claims.

The Eleventh Circuit is thus far the loudest advocate for but-for causation. The Sixth Circuit has trodden gently, concluding in its 2016 unpublished Sharp v. Profitt decision that the but-for standard seems correct.[4]

Conversely, the U.S. Courts of Appeals for the Second, Third and Seventh Circuits have gone the other route, concluding that the motivating-factor standard is correct.[5]

Interestingly, in Egan v. Del River Port Authority in 2017, the Third Circuit appeared to analyze the issue the same way that the Eleventh Circuit did in Lapham, but the Third Circuit deferred to the DOL guidance that the Eleventh Circuit dismissed. The remaining appellate courts have yet to take up the issue, while trial courts across the country have reached their own conclusions.

The Lapham decision is significant for employers in the Eleventh Circuit.

Employers in Florida, Georgia and Alabama who face an FMLA retaliation claim can now argue it is not enough for a plaintiff to show that their activity protected by the FMLA somehow motivated their termination, demotion or other adverse action.

If employers in this jurisdiction can credibly demonstrate that they would have taken the adverse action regardless of the protected activity, they can overcome a retaliation claim.

Conversely, only if a plaintiff can prove that her protected activity was the actual cause of any termination, demotion, or other adverse action or impact on her employment, and that she would not have been adversely affected without her protected activity, can her claim succeed.

Moreover, employers in other jurisdictions can likewise point to Lapham as the most recent published authority on the issue to advocate for the but-for standard.

However, employers in the Second, Third and Seventh Circuits will likely need to take further precautions before making adverse decisions about an employee who has taken some action under the FMLA.

Given the significance of this issue and the disagreement among lower courts, odds are that the U.S. Supreme Court will eventually address the matter itself and issue a final

determination as to which standard is correct. But for the time being, employers will have to remain mindful of the FMLA causation standard accepted in their jurisdiction.

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[1] Lapham v. Walgreen Co. , No. 21-10491 (11th Cir. 2023).

[2] University of Texas Southwestern Medical Center v. Nassar , 570 U.S. 338 (2013).

[3] 29 U.S.C. § 2615(a)(2).

[4] Sharp v. Profitt , No. 14-3959, 674 Fed. Appx. 440 (6th Cir. 2016) (noting "[i]t is likely that causation in [the FMLA retaliation] analysis means actual or 'but-for' causation … given our interpretation practices and the meaning 'for' has in the statute's context, it seems that FMLA retaliation requires a showing of but-for causation.").

[5] See Woods v. START Treatment & Recovery Ctrs. Inc. , 864 F.3d 158 (2d Cir. 2017) ("We hold that FMLA retaliation claims…require a 'motivating factor' causation standard…"); Egan v. Del River Port Auth. , 851 F.3d 263 (3d Cir. 2017) (opining that, while "the default standard of 'but for' causation seems to be applicable," the court was bound to follow the DOL's guidance and impose the "motivating factor" standard); Lewis v. Sch. Dist. #70 , 523 F.3d 730 (7th Cir. 2008) (explaining that a plaintiff "need not prove that retaliation was the only reason for her termination" and that FMLA retaliation claims can be satisfied through the "motivating factor" analysis).