The Case of *Graham v. Barrier Technologies*: Reducing Exposure To Liability in the Midst of a Pandemic
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Executive Summary: On June 15, 2021, the Southern District of Florida granted summary judgment in favor of employer Barrier Technologies, LLC ("Barrier Technologies" or the "employer"), a manufacturer of radiation protection products, on former employee Tracey Graham's ("Graham" or the "employee") claim of retaliation under the Emergency Paid Sick Leave Act ("EPSLA"), Division E of the Families First Coronavirus Response Act ("FFCRA"). In reaching its determination, the Court found the employee failed to establish but-for causation as her employer made its termination decision two weeks before the employee went on leave for her viral symptoms and had no reason to believe the employee was on leave for COVID-19-related reasons.

Despite the prevalence of these claims as a result of the impact of COVID-19 on the American workplace, employers can limit their exposure to such claims by familiarizing themselves with federal, state, and local regulations pertaining to COVID-19 and implementing workplace policies consistent with these regulations.

Case Details

The underlying events of this case took place during the early stages of the COVID-19 pandemic in March 2020. The employee, who worked as an embroiderer, claimed that her employer violated the EPSLA by terminating her employment after she allegedly developed viral symptoms and self-isolated as she was advised to do by her health care provider.

Specifically, the employer sent the employee home for the day after she reported to her employer that she was "not feeling well." The employee did not specify what her symptoms were, and her employer did not inquire about her symptoms but permitted her to go home for the day. This occurred after she received a normal temperature reading during a temperature screen by the employer. The employee later attended a telemedicine consultation and was provided a visit summary and doctor's note. Prior to the litigation, the employer only received the doctor's note which stated that the employee was experiencing "viral symptoms" and could stop self-isolation and return to work in seven days. Importantly, the note did not mention COVID-19, as a COVID-19 diagnosis could not be made remotely, and the employee never informed her employer that she believed she had COVID-19. The employer, who was used to the employee leaving work early, had no reason to believe the employee had COVID-19, since the doctor's note stated she was to isolate for seven days rather than the fourteen days typically required for exposures to COVID-19. Likewise, the employee had a normal temperature reading the morning she was sent home. Accordingly, the employer did not perform any contact tracing, as it typically would have done upon learning that an employee tested positive for COVID-19, as it had no reason to believe the employee had COVID-19.

A day before the employee was scheduled to return to work from her leave, the employer terminated her employment. In support of its termination decision, the employer cited the lack of available work, the employee's poor reliability, and the fact that she was within her probationary

period. The employee was terminated along with another employee who was underperforming in sales. The employer made the termination decision more than two weeks before the employee went on leave for her viral symptoms and, as such, her viral symptoms played no role in its decision.

At issue in this case were Division E of the EPSLA, which requires an employer to provide sick leave to an employee who has been advised to self-quarantine due to COVID-19-related concerns, and section 5104 of the EPSLA, which makes it unlawful for an employer to retaliate against an employee who takes leave in accordance with the Act.[1]

The Court determined that but-for causation was not met in the case because the employer made its termination decision before the employee took leave. The Court also rejected the employee's argument that the employer's witnesses were not credible as courts do not make credibility determinations on summary judgment.

Further, the Court found that the employee could not prevail since the employer was not aware of any COVID-19-related concerns at the time of the employee's termination, and as such, the employee could not demonstrate that the employer was aware of protected conduct at the time of her termination. The Court also noted that the employee was employed on an at-will, probationary basis and that she either arrived late, left early, or missed a day of work during six of the seven weeks of her brief employment with the employer, which supported the employer's argument that it had no reason to believe that the employee was out of work due to COVID-19 concerns.

How Employers Can Avoid These Types of Claims

One of the first of its kind, the *Graham* case presented a unique set of obstacles in addition to the typical stressors associated with litigation. Indeed, this case took place at the height of the pandemic when employees were being laid off due to the pandemic's negative impact on businesses nationwide. In particular, the media's coverage of the case resulted in significant negative press over the employer's alleged misconduct as described by the plaintiff.

However, with the proper planning and policies, employers can limit their exposure to these types of claims.

First, employers should familiarize themselves with federal, state, and local requirements pertaining to COVID-19 to ensure their COVID-19-related policies are lawful.

Second, employers should clearly explain their policies relating to COVID-19 and make them readily available to their employees. In doing so, employers should consider addressing common issues such as COVID-19 screening protocols, medical leave, and the job-related reasons for any mandatory workplace policies such as mandatory masks or vaccination mandates.

[1] The EPSLA is patterned after the FLSA and, accordingly, the Court followed the FLSA's analysis for a *prima facie* case of retaliation which requires a showing of but-for causation.

Employers should also consider whether their policies single out any particular protected class so as to expose the business to a potential disparate impact claim. As the U.S. Equal Employment Opportunity Commission noted in its recent updates to its "What You Should Know About COVID-19" guidance, employers should make sure not to engage in unlawful disparate treatment based on protected characteristics in decisions related to screening and exclusion. For instance, an employer who offers a vaccination incentive to employees belonging to a certain job classification but not the other may be at risk for a disparate impact claim if the excluded group is overwhelmingly comprised of a particular protected class. Further, employers should be prepared to reasonably accommodate any employees who cannot comply with their policies for reasons relating to disability, pregnancy, or religion.

Finally, employers should clearly document their reasons for any adverse employment decisions. This is particularly critical to limiting exposure to claims of discrimination and retaliation under either the EPSLA, Title VII of the Civil Rights Act of 1964, and the Americans with Disabilities Act.