

## Court: FMLA Protection Applies Before Leave Starts

In a recent decision, the Third Circuit Court of Appeals ruled that an employee does not need to actually begin a leave under the Family and Medical Leave Act (FMLA) to establish a claim for interference or retaliation under the FMLA. The court pointed out that “it would be patently absurd if an employer who wished to punish an employee for taking FMLA leave could avoid liability simply by firing the employee before the leave begins.”

In *Erdman v. Nationwide Ins. Co.*, 2009 U.S. App. LEXIS 20979 (3d Cir. Sept. 23, 2009), the plaintiff, Brenda Erdman, claimed that Nationwide terminated her improperly for requesting FMLA leave. In April 2003, Erdman submitted paperwork to Nationwide, requesting FMLA leave starting in July. Nationwide terminated Erdman’s employment in May 2003, “citing her purported behavioral problems,” including Erdman’s use of profanity during a monitored telephone conversation. Erdman filed suit against Nationwide, alleging that those reasons were pretext and that Nationwide really fired her for requesting FMLA leave, so that the firing constituted interference with and retaliation for attempting to assert Erdman’s FMLA rights.

The court interpreted the FMLA and its accompanying regulations as applying when an employee first invokes his or her rights under the FMLA – such as when a request for FMLA leave is made – not when the leave actually begins. As such, the court held that firing an employee for making a “valid request” for FMLA leave may constitute interference with the employee’s FMLA rights and retaliation against the employee under the FMLA. The court did not define a “valid request” under the FMLA. Borrowing from case law under other employment law statutes, however, it is reasonable to assume that, if an employee makes a request for FMLA leave in “good faith,” he or she will be protected under the FMLA.

In light of the *Erdman* decision, all employers covered by the FMLA should take time now to review their FMLA policies and practices. For more information or if you have a question about this or another labor matter, please contact any member of Pepper’s Labor and Employment Practice Group.

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