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## Third Circuit Sets Precedent In Holding That Direct Evidence Of Retaliation Is Not Necessary

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In a precedential decision, the Third Circuit ruled that an employee exercising leave under the Family and Medical Leave Act ("FMLA") need not prove retaliation by direct evidence. *Egan v. Delaware River Port Authority*, No. 16-1471 (3d Cir. Mar. 21, 2017).

### BACKGROUND

Plaintiff Joseph Egan ("Egan") was employed at the Delaware River Port Authority ("Port Authority") from July 2008 until his termination in October 2012. He claimed he suffered migraine headaches since an accident in 1995 and requested intermittent leave under the FMLA in April 2012. The Port Authority approved Egan's request for leave. However, while Egan was on FMLA leave, the Port Authority informed Egan that his position was eliminated and he was being terminated.

Consequently, Egan brought suit against his former employer claiming the Port Authority discriminated against him on the basis of his age and disability and also retaliated against him in violation of the FMLA, because he took intermittent leave for his migraines. The Port Authority refuted the claims by arguing that Egan's position was eliminated.

At trial, Egan requested that the jury be provided with a "mixed-motive" instruction, which would require the jury to find for him if it determined that his exercise of rights under the FMLA was a "negative factor" in the Port Authority's decision to terminate him. The trial judge denied Egan's request for the instruction because Egan did not present any direct evidence that his use of leave under the FMLA motivated the Port Authority to terminate him.

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After trial, the jury returned a verdict for the Port Authority on all counts, finding the Port Authority did not discriminate or retaliate against Egan. Egan, however, appealed the decision to the Third Circuit arguing that the trial judge improperly required Egan to prove retaliation by "direct evidence" and precluded Egan from offering the jury a "mixed-motive" instruction.

A mixed-motive instruction would permit the jury to consider whether an employee exercising leave under the FMLA was a motivating factor in the employer's decision to terminate an employee. Under this instruction, even if there were lawful reasons for the Port Authority to terminate Egan, a jury would be permitted to consider whether Egan's exercise of leave under the FMLA was a motivating factor for the Port Authority in its decision to terminate him.

On appeal, the Third Circuit reversed the Trial Court's decision and ruled that a "mixed-motive" instruction should have been given to the jury as to Egan's retaliation claim under the FMLA. The Third Circuit agreed with Sixth and Ninth Circuit precedent as well as interpretation by the Department of Labor ("DOL"), finding that "in enacting the FMLA, Congress chose to ensure that those who need to address serious health issues may do so without interference. The regulation precludes an employer from considering the use of such leave as a negative factor in an employment decision." The Third Circuit further found that "imposing this requirement [mixed-motive] makes sense, especially since a claim of retaliation includes an implication that the employer was motivated, at least in part, by the employee's use of FMLA leave." Accordingly, the Third Circuit ruled that the Trial Court improperly required Egan to produce direct evidence of retaliatory motive and remanded the case back for a new trial on the FMLA retaliation claim.

#### **TAKEAWAY FOR EMPLOYERS**

Employers should be mindful of potential retaliation claims when an employee exercises leave under the FMLA. To avoid such a claim, it is important for employers not to draw any negative inference when an employee exercises leave. Comments such as "this employee is out again," "how long is this going to last," or "are you really hurt" can be interpreted as an inference of anger or frustration with the employee exercising leave. In addition, if an employee's position is restructured or eliminated during the time the employee is on leave, employers should actively communicate with the employee and document the reasons for such restructuring or elimination, including if done during the leave, the reasons for the timing.

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