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### TERMINATION

## Adjuster's claims based on discharge after giving FMLA notice fail

by Lance D. Rich

*Does an employee engage in protected activity under the Family and Medical Leave Act (FMLA) by notifying his employer of his plans to take FMLA leave, or must he actually take FMLA leave? If an employer accommodates an employee's disability for a substantial period of time, does the Americans with Disabilities Act (ADA) prevent it from later firing him when he can't perform the essential functions of his job? How can employers show that the ability to perform certain tasks is essential for a given job? Find the answers to those questions and more in the following case.*

### **'High, precarious places'**

Scott Wehrley worked as a field claim adjuster for American Family Mutual Insurance Company (AFMIC). His position included on-site property inspections. The job description stated that the job required "the ability to work in high, precarious places between 1 and 33% of the time," "the ability to climb or balance between 1 and 33% of the time," and "the ability to stoop, kneel, crouch or crawl between 1 and 33% of the time." In the unit in which Wehrley worked, approximately 57% of the claims were roof-related.

In June 2007, Wehrley fell from a ladder while inspecting a roof and injured his knee and lower back. His supervisor, Jeff Bourcy, assigned him to desk work until he could walk again and then assigned him to field claims that didn't involve roofs or ladders. In December, AFMIC's doctor determined that Wehrley had reached maximum medical improvement and removed all his work restrictions. Wehrley sought an independent medical exam. The second doctor first concluded that he should avoid kneeling and crawling when possible. He later reinstated the ladder and roof restrictions and eventually determined that Wehrley needed knee surgery.

In July 2008, Wehrley informed Bourcy that he was scheduled for knee surgery. When AFMIC's workers' compensation insurer declined to cover the surgery, Wehrley postponed it until he could work out coverage. On August 6, Bourcy asked him whether he had requested FMLA leave. Wehrley said he intended to request FMLA leave once his surgery was scheduled, but he was waiting to see if his insurance company would cover the surgery. Bourcy replied that his course of action was reasonable.

On August 22, Bourcy informed Wehrley that if he didn't perform roof claims, his job could be in jeopardy. He said climbing roofs was an important part of the job and that Wehrley's failure to perform roof claims increased the workload for other adjusters. On August 28, Bourcy again asked Wehrley if he had received a response from his insurance company or requested FMLA leave. When Wehrley responded no to both questions, Bourcy fired him, citing his inability to perform roof inspections. Wehrley was given a termination letter informing him that he wasn't eligible for rehire with AFMIC.

Wehrley filed a lawsuit in Colorado state court, but AFMIC had it transferred to federal district court in Colorado. Among other things, Wehrley asserted claims for discrimination under the ADA and retaliation under the ADA and the FMLA. The federal district court dismissed his claims without a trial, and Wehrley appealed to the U.S. 10th Circuit Court of Appeals, which governs Utah as well as Colorado.

### **Reliance on accommodation doesn't save ADA bias claim**

To establish a basic claim of ADA discrimination, Wehrley was required to show the following:

- (1) He was disabled.

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- (2) He was qualified, with or without a reasonable accommodation, to perform the essential functions of his job.
- (3) AFMIC discriminated against him because of his disability.

Although the district court found that Wehrley didn't satisfy the first prong because he didn't show he was substantially impaired in any major life activity, the 10th Circuit focused on the second prong and whether he was able to perform the essential functions of his job.

The 10th Circuit concluded that Wehrley failed to establish a basic ADA discrimination claim because he was unable to perform the essential functions of his job. It noted that written job descriptions prepared before advertising and interviewing applicants for a job, as well as the amount of time spent on the job performing the function, can show that a particular function is essential.

Wehrley's job description specified that essential functions of the job included working in high, precarious places up to one-third of the time and the ability to stoop, kneel, crouch, or crawl up to one-third of the time. Also, 57 percent of the claims in Wehrley's unit were roof-related and consequently required climbing ladders.

The court rejected Wehrley's argument that because AFMIC had accommodated him by not assigning him roof assignments for more than a year, it was required to continue to do so. The court stated that employees can't rely on an employer's accommodation to show that certain job duties are nonessential because doing so would perversely punish employers for going beyond the minimum standards of the ADA.

The court also rejected Wehrley's argument that the number of field assignments given to other adjusters didn't increase because he failed to provide sufficient evidence of that assertion. Although he submitted an affidavit of another adjuster who stated he was unaware of any increased workload due to Wehrley's injury, the court concluded that it did nothing to disprove AFMIC's assertion that climbing ladders is an essential function of the job. Thus, the court concluded that the district court properly dismissed Wehrley's ADA discrimination claim.

### ***Court accepts 'ladder' reason for dismissing ADA retaliation claim***

To establish a basic retaliation claim under the ADA, Wehrley was required to show:

- (1) He engaged in protected activity.
- (2) A reasonable employee would have found the challenged action significantly adverse.
- (3) A causal connection exists between the protected activity and the significantly adverse action.

Once a basic retaliation claim is established, an employee can reach trial on his claim if he can show enough evidence to raise a genuine issue about whether the employer's explanation for the adverse employment action was a pretext for unlawful discrimination. Unlike an ADA discrimination suit, with an ADA retaliation claim, an employee doesn't have to show that he suffered from an actual disability so long as he has a reasonable good-faith belief that he was disabled.

The district court concluded that no reasonable jury could find that Wehrley had a reasonable good-faith belief that simply because he couldn't descend a ladder, he was disabled under the ADA. Alternatively, the district court found that Wehrley failed to show pretext for his termination.

Although the 10th Circuit was unable to accept the district court's first reason for dismissing the ADA retaliation claim (Wehrley was disabled under the ADA), it did accept the *latter* reason (he failed to show pretext). Wehrley submitted an independent medical exam and an "expert report" by a rehabilitation counselor. Those two documents were enough to create a triable issue about whether he had a good-faith belief that he was disabled. The court agreed, however, that he failed to present sufficient evidence to establish that AFMIC's explanation that he was fired because he was unable to perform roof inspections was a pretext for discrimination.

Wehrley argued several points in support of pretext. First, he offered the testimony of another adjuster who was unaware of complaints about additional burdens during Wehrley's year at a desk job. Second, AFMIC notified Wehrley that his job was in jeopardy only a few days before his firing; previously, it indicated he was doing a good job. Third, it made no effort to reassign him, even though he was willing to work in other positions. Finally, it told him that he was ineligible for rehire.

The court rejected each of those arguments, stating that even though AFMIC voluntarily accommodated Wehrley for more than a year, it wasn't obligated to do so. Bourcy's assurances that he was doing a good job may have been misleading, but it didn't amount to an assurance that he wouldn't be fired. While Wehrley may have been willing to work in another position, he never requested reassignment. Finally, although AFMIC's unwillingness to rehire him was somewhat suggestive of pretext, the court didn't give it much weight because before firing him, AFMIC verified that no desk jobs in Wehrley's areas of expertise existed in the Denver office.

### ***FMLA retaliation claim fails for a new reason***

To establish a basic case of FMLA retaliation, Wehrley was required to show the following:

- (1) He engaged in protected activity.

- (2) He suffered an adverse employment action.
- (3) A causal connection exists between the protected activity and the adverse action.

The district court found that Wehrley didn't engage in protected activity because he never actually took FMLA leave. Alternatively, the district court concluded that he didn't establish the requisite causal connection.

The 10th Circuit rejected both of the district court's reasons for dismissing Wehrley's FMLA retaliation claim. On an issue not previously decided by the appellate court, the 10th Circuit held that notifying an employer of the intent to take FMLA leave is protected activity. The court reasoned that because the FMLA requires employees to give employers at least 30 days' notice before taking leave for foreseeable medical treatment, notice must be protected; otherwise, it would allow employers to preemptively fire, without ramifications, employees who plan to take FMLA leave. The court found that Wehrley had shown a causal connection between notifying AFMIC that he intended to take FMLA leave and his termination based on the temporal proximity (just five weeks) between the two events.

Nevertheless, the court cited another reason for upholding the dismissal of Wehrley's FMLA retaliation claim. As with his ADA retaliation claim, he failed to show that AFMIC's explanation for his firing—that he couldn't perform the essential functions of his job—was a pretext. The court stated that none of the evidence suggested that AFMIC was opposed to Wehrley taking FMLA leave. Indeed, Bourcy encouraged him to contact the FMLA coordinator as soon as possible when his surgery was initially scheduled. Thus, the 10th Circuit upheld the district court's dismissal of all Wehrley's claims, but for different reasons. *Wehrley v. American Family Mutual Insurance Company*, 2013 WL 28474 (10th Cir., January 3, 2013).

## ***The essentials***

It's important to know that under the FMLA, employees engage in protected activity when they notify their employer of their intent to take FMLA leave. They don't actually have to take leave to be protected. As shown in this case, there still may be legitimate reasons for firing an employee under those circumstances, but employers should exercise caution in doing so and seek the advice of competent employment counsel to ensure the reasons for termination will hold up in court.

Additionally, employers should be wary of informing employees upon termination that they are ineligible for rehire. In this case, the court noted that telling an employee he can't be rehired can suggest pretext. The result could have been different if AFMIC hadn't (1) verified that no suitable positions for Wehrley were available before telling him he was ineligible for rehire and (2) taken other measures that clearly supported the reason for his discharge.

On a positive note, employers can offer accommodations to an employee who is unable to perform the essential functions of the job without fear that doing so will jeopardize their ability to take adverse action against him later if needed.

Finally, this case demonstrates the importance of carefully crafting job descriptions that include the essential functions of each job. AFMIC's job description spelled out the essential activities that a field adjuster needed to be capable of performing. Although they're not infallible, detailed job descriptions can act as a safety net to catch potential ADA claims when employees can no longer perform the essential functions of their job.

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