

DOES FMLA NOT PROTECT PREGNANT EMPLOYEE WHO REQUESTED LEAVE BEFORE SHE WAS ELIGIBLE?



A recent court appeal examined the Family and Medical Leave Act (FMLA): more specifically, if a person requests leave before he/she is eligible, for a time when eligibility will be in place, is that person entitled to the same protection? A woman worked at a Pompano Beach, FL, facility for Brookdale Senior Living Communities. Eight months after she was hired, she informed the company that she was pregnant and would be requesting FMLA leave after her child was born approximately five months from that time. The woman claims that there were no problems prior to the announcement of her pregnancy. Afterwards, however, she alleges harassment from Brookdale. She stated in court that her job performance was unfairly criticized and she was placed on a plan for improvements "with unattainable goals." The woman blamed the company's harassment for inciting complications during her pregnancy. At this time, she was eligible for sick and personal leave, and she alleges that management approved doctor visits. Nevertheless, she was written up for doctor visits subsequent to being placed on the performance improvement plan. She was written up again for notifying management via email for taking time off and not receiving a verbal authorization. She further alleges that she was told of her eligibility for non-FMLA leave, which she tried to utilize for physician-recommended bed rest. A message left for the Executive Director heeded no response, and following several days of being unable to reach anyone,



the woman was fired. She filed a complaint, alleging an FMLA violation with two counts of interference and retaliation. The district court dismissed her complaint, stating that there was no interference because, at the time that the plaintiff made a request for FMLA leave, she was ineligible. Therefore she was not protected by the FMLA, which would likewise negate any probable retaliation from Brookdale. On appeal, the woman argued that the district court's decision would make employees fearful of retaliation if pregnant and consequently fail to provide sufficient notice of an impending birth. Brookdale countered by stating that the employee was never protected by the FMLA – she was terminated before reaching eligibility – and should not be afforded such rights. The appeals court first assessed the undisputed facts: The woman was not eligible for FMLA at the time she requested leave, but would have been eligible by the time she gave birth and took her leave. Then the court noted the potential for a "loophole," by which employers could easily fire workers before they ever became eligible for FMLA-protected leave. Furthermore, FMLA guidelines stipulate at least 30 days' notice of extended leave, which was intended to protect the employer. An employer using the advanced notice requirement as a means of subverting liability is "inconsistent" with the FMLA, the court believed. Because the appeals court supported the woman's FMLA protection, it also saw cause for a retaliation claim. The district court's ruling was reversed, and the case was remanded for further proceedings.