

# Employer's 'Honest Belief' Thwarts FMLA Retaliation Claim

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An employer's "honest belief" that an employee misused the Family and Medical Leave Act can be enough to defeat an FMLA retaliation claim, the Third Circuit has ruled.

The court also held in the precedential opinion, issued Monday, that a request for intermittent FMLA leave can constitute a request for a reasonable accommodation under the Americans With Disabilities Act, though it ultimately found that wasn't the case here.

In *Capps v. Mondelez Global*, a three-judge panel of the court affirmed a ruling by U.S. District Judge Gerald J. Pappert of the Eastern District of Pennsylvania, granting summary judgment in favor of snack food and beverage giant Mondelez Global.

The appeals court agreed with Pappert that plaintiff Frederick Capps failed to prove he was fired by Mondelez in retaliation for taking FMLA leave, that the company interfered with his rights under the FMLA and violated the ADA by failing to accommodate his disability.

Regarding the retaliation claim, Pappert had ruled that Capps could not establish a prima facie FMLA retaliation case because he failed to show that his FMLA leave was causally connected to his termination. But, even if he could, his retaliation claim still would have failed because Mondelez showed it had a legitimate, nondiscriminatory justification for firing Capps: that it honestly believed he had misused FMLA leave.

The U.S. Court of Appeals for the Third Circuit agreed, adopting the rationale employed by the Seventh, Eighth and Tenth circuits.

"Where an employer provides evidence that the reason for the adverse employment action taken by the employer was an honest belief that the employee was misusing FMLA leave, that is a legitimate, nondiscriminatory justification for the discharge," said Judge Luis Felipe Restrepo, pointing to the Seventh Circuit's 1997 ruling in *Kariotis v. Navistar International Transportation*.

Restrepo was joined in the ruling by Judge Patty Shwartz and Senior Judge Julio M. Fuentes. While the Third Circuit had applied the "honest belief" rule in two previous nonprecedential opinions, the *Capps* case marks the first time the court officially adopted the rule.

In addition to the *Kariotis* case, Restrepo took guidance from the Seventh Circuit's 2012 ruling in *Scruggs v. Carrier*, in which the court said "'the question is not whether [the employer] was correct to believe that [the employee] performed poorly, but rather whether he honestly believed that she did.'"

Restrepo also pointed to a similar 2012 ruling by the Eighth Circuit in *Pulczynski v. Trinity Structural Towers*. In addition, Restrepo looked to the Tenth Circuit's ruling in *Medley v. Polk*, which said discrimination laws "allow employers to discharge employees for almost any reason whatsoever (even a mistaken but honest belief) as long as the reason is not illegal discrimination."

Lauri A. Kavulich, a labor and employment litigator at Clark Hill in Philadelphia who was not involved in the *Capps* case, said that while the ruling's adoption of the "honest belief" rule was a positive for

employers overall, the outcomes of these types of cases are still going to depend heavily on the facts.

Employers who invoke the rule will still need be sure they have the evidence to back them up because plaintiffs will get the opportunity to try to prove the claimed "honest belief" was pretextual, Kavulich said.

"Remember, there's still the word 'honest' in there," Kavulich said. "This case had the facts; other cases might not have the facts."

Capps' attorney, Christine E. Burke of Karpf, Karpf & Cerutti in Bensalem, said that while she respected the court's ruling, it seemed to ignore her argument citing U.S. Department of Labor guidance that, unless an employer has a policy to the contrary, employees are free to do what they wish during FMLA leave, with no restrictions.

Mondelez had no such policy, which Burke said makes the Third Circuit's ruling "problematic" because it could open the door for employers to target employees on FMLA leave for engaging in conduct like running errands or picking up their children from school.

In *Capps*, according to Restrepo, the plaintiff has avascular necrosis (AVN), which necessitated a bilateral hip replacement around 2003. As a result, Restrepo said, Capps sometimes experiences severe pain in his pelvic region, thighs and hips that can last days or weeks at a time. Capps sought and received from Mondelez permission to take intermittent FMLA leave when flare-ups occurred.

Capps was arrested for driving under the influence on a day in which he had taken FMLA leave. He also took FMLA leave the following day after being released from jail, according to Restrepo.

When he returned to work, he did not report his arrest to his employer and was not required to do so under Mondelez's policies, according to Restrepo. But in early 2014, the company's human resources department became aware of Capps' arrest from a newspaper article and eventually determined from the court docket that many of the days on which he took FMLA leave coincided with days listed on the docket for his criminal case.

After the company confronted Capps with this information, he produced a letter from his physician vouching for his absence on several dates. He also produced a letter from his attorney confirming several court dates Capps had been present for, according to Restrepo.

Capps was notified of his termination by letter dated March 21, 2014, effective Feb. 26, 2014. The letter confirmed that Capps' firing was based on his violation of the company's Dishonest Acts Policy, which states that "any employee found guilty of a dishonest act would be subject to dismissal." According to Restrepo, the termination letter further stated: "'You claimed to be out due to [ ] FMLA related issues on multiple dates. The documentation you produced does not support your claim of [ ] FMLA related absences.'"

Capps argued in his lawsuit that Mondelez was mistaken in its belief that he had misused his leave or was otherwise dishonest about his leave, but Restrepo said "there is a lack of evidence indicating that Mondelez did not honestly hold that belief."

"Accordingly, in light of insufficient evidence for a reasonable factfinder to conclude that Mondelez's legitimate, nondiscriminatory explanation for terminating Capps' employment was a pretext, the district court properly granted summary judgment on Capps' FMLA retaliation claim," Restrepo said, adding that, regardless, Pappert correctly found that Capps failed to establish a causal link between his firing and his FMLA leave.

Restrepo said in a footnote that in order to establish such a link, Capps would have had to show an "unusually suggestive temporal proximity" between his taking leave and his termination, as well as a pattern of antagonism toward him by Mondelez for taking leave.

Restrepo also upheld Pappert's dismissal of Capps' FMLA interference claim, finding that Capps failed to show that FMLA benefits were actually withheld from him.

Addressing an issue raised on appeal by the Equal Opportunity Employment Commission, acting as amicus curiae, Restrepo did note that Pappert was wrong to find that a request for FMLA leave could not constitute a request for a reasonable accommodation under the ADA, but affirmed the district judge's ruling that Capps failed to prove he was denied such an accommodation.

"There is clearly a lack of evidence to show that Mondelez did not make a good-faith effort in accommodating Capps' request for intermittent leave," Restrepo said.

Counsel for Mondelez, Leslie M. Greenspan of the Tucker Law Group in Philadelphia, said she and her client are "very pleased the court affirmed the employer's ability to make sure that people aren't abusing their FMLA leave."

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