

Employer's 'Honest Belief' Is Complete Defense to FMLA Retaliation Claim

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It's one thing to be certain, but you can be certain and you can be wrong.

—Senator John F. Kerry during presidential debate with George W. Bush, Sept. 30, 2004

In *Capps v. Mondelez Global*, 847 F.3d 144 (3d Cir. 2017), the Third Circuit determined that an employer who was both certain and wrong that an employee misused his FMLA leave could escape liability under the Family and Medical Leave Act (FMLA). The court held that the employer's "honest belief"—even if mistaken—was sufficient as a matter of law to defeat a FMLA retaliation claim. Accordingly, under the *Capps* holding, as long as the employer demonstrates that its belief resulted from an honest mistake, the employee cannot support a retaliation claim.

The Facts

Frederick Capps had worked for defendant Mondelez Global and its predecessor Nabisco for nearly 24 years as a dough-mixing machine operator. Due to a degenerative bone disease condition called avascular necrosis, Capps developed arthritis in both hips, which necessitated a bilateral hip replacement in 2003. He continued to suffer severe pain at times in the pelvic region, thighs and hips and experienced temporary periods of inflammation that were "debilitating" and which required "anti-inflammatory medication and rest." Accordingly, he requested and was certified for intermittent leave under the FMLA, which certification he renewed on a bi-annual basis.

On Monday, Feb. 11 and Tuesday, Feb. 12, 2013, Capps took FMLA leave due to leg pain. After working a full shift on Wednesday, Feb. 13, he requested a partial day and, when the pain continued to persist, a full day of leave for Thursday, Feb. 14.

The night of Feb. 14, Capps traveled to a local pub "not more than one and a half miles from his home, to 'get something to eat.'" During his short time at the pub, Capps drank several alcoholic beverages and then attempted to drive home. He was pulled over and then arrested for driving under the influence of alcohol (DUI). Mondelez's policies did not require him to report his arrest. After his release from jail the following morning, Feb. 15, Capps again called his employer and stated that he would be using FMLA leave due to leg pain.

Capps returned to work on Monday, Feb. 18. He continued to work without incident and, at the end

of July 2013, was recertified for intermittent FMLA leave. On Aug. 7, 2013, Capps pled guilty to the DUI charge and was sentenced to 72 hours in jail. He was also placed on probation, assessed costs and fines, and had his driver's license suspended.

In early 2014, Mondelez's human resources manager, William Oxenford, learned of Capps' DUI conviction and sentence through a newspaper article. According to Capps, Mondelez claimed that an "anonymous source" "slipped" the article under Oxenford's door. See Appellant's Brief filed 2/29/16 ("App. Brf.") at 7. Oxenford directed his subordinates to investigate Capps' attendance record to determine if Capps had any absences during the period in which he was arrested and then convicted. According to Capps, one of the subordinates testified that, because Capps frequently called out for FMLA, Oxenford was suspicious as to whether the DUI arrest occurred on an FMLA day and specifically asked her to look in the FMLA system. *Id.* at 9.

The investigation revealed that his arrest date, Feb. 14, 2013, was a day on which Capps had called out on FMLA leave. In addition, he called out of work using FMLA leave on two other dates that appeared on the court docket. When Capps was confronted with this information at a meeting on Feb. 26, 2014, he promised to provide documentation to support his FMLA leave on the days in question. The record demonstrated that he provided such documentation from his physician as well as evidence from his criminal defense attorney which showed that he did not appear in court on the dates in question.

Nevertheless, on March 21, 2014, Capps was notified that his employment was being terminated due to his alleged violation of Mondelez's "Dishonest Acts on the Part of Employees." Mondelez noted that, although Capps had "claimed to be out due to FMLA-related issues on multiple dates," he had failed to provide sufficient documentation "[to] support [his] claim of FMLA-related absences." Capps disputed this assertion, noting "that the documents [he] provided did support his basis for FMLA on the dates in question by his employer (and a reasonable jury [could have] conclude[d] as much)." App. Brf. at 13-14.

The Court's Analysis

The court in *Capps* noted that the FMLA provides, in relevant part, that an eligible employee may take a total of 12 weeks of leave during any 12-month period due to his or her own serious health condition. 29 U.S.C. §2612(a)(1). The statute requires the employer to reinstate an employee who returns from leave to either the same or an equivalent position. 29 U.S.C. §2614(a). The employer is prohibited from interfering with the employee's FMLA rights or discriminating against an individual who opposes a practice "made unlawful" under the FMLA. 29 U.S.C. §2615(a)(1)-(2). Finally, an employer may not retaliate against an employee who exercises his or her FMLA rights. 29 C.F.R. §825.220(c).

The Third Circuit noted that, to succeed on an FMLA retaliation claim, a plaintiff must show that: (1) he invoked a right to FMLA-qualifying leave; (2) he suffered an adverse employment decision; and (3) a causal relationship exists between the adverse action and the invocation of rights. The court held that, in demonstrating that it held an honest belief that Capps was misusing his FMLA leave, Mondelez had met its burden of demonstrating a legitimate, nondiscriminatory justification for Capps' discharge.

In so holding, the court cited to a number of cases outside the Circuit such as *Scruggs v. Carrier Corp.*, 688 F.3d 821 (7th Cir. 2012); *Pulczynski v. Trinity Structural Towers*, 691 F.3d 996 (8th Cir.

2012); and *Medley v. Polk Co.*, 260 F.3d 1202 (10th Cir. 2001). All of these cases stand for the proposition that, in analyzing FMLA retaliation claims, "the question is not whether the employer's reasons for a decision are '*right*' but whether the employer's description of its reasons is '*honest*.'" *Kariotis v. Navistar Int'l Transp. Corp.*, 131 F.3d 672, 677 (7th Cir. 1997) (quoting *Gustovich v. AT&T Communications*, 972 F.2d 845, 848 (7th Cir. 1992) (emphasis in original)). The Third Circuit therefore agreed that "'when an employee is discharged because of an employer's honest mistake, federal anti-discrimination laws offer no protection.'" *Medley*, 260 F.3d at 1208 (quoting *Kariotis*, 131 F.3d at 680).

Conclusion

The Third Circuit in *Capps* gave employers who purport to terminate employees because they are misusing their FMLA leave an ironclad defense. The *Capps* holding would appear to preclude a plaintiff from arguing that the employer's alleged suspicion of FMLA misuse is a mere pretext for retaliation. As long as the employer asserts that it "honestly believed" that the employee was misusing his or her leave, this defense is sufficient under *Capps* as a matter of law to defeat a FMLA retaliation claim. •

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