

Human Resource Director's Statements Serve as Direct Evidence of Discrimination

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An employee who worked in a law firm's marketing department took leave under the Family Medical Leave Act (FMLA). The leave was scheduled to begin just before the birth of her child and continue after the birth. While the employee was on leave, the employer decided to eliminate the employee's position "as part of an organizational restructuring." When the employee came to the employer's office to remove her belongings, the employer's director of human resources allegedly told her that she "was let go because of the fact that [she] was pregnant . . . and took medical leave." The employee sued, alleging that she was discriminated against based upon her pregnancy, that she was retaliated against for taking FMLA leave, and that the employer interfered with her right to take FMLA leave by failing to reinstate her when her leave expired. The employer argued that the employee had no evidence to support her claims because the director's statements were "hearsay," (statements that were made outside of court that may not be considered as evidence). The U.S. Court of Appeals for the Seventh Circuit held that the director's statements were admissible evidence. While the director's statements were "hearsay," the court found that an exception applied to allow them to be considered. Specifically, the exception allowing out of court statements or "admissions" made by a party to a lawsuit to serve as evidence was applicable. The director's statements were "admissions" attributable to the employer because the director made them within the scope of her employment, which included regular involvement in the elimination of positions and termination of employees. Because the director's statements were admissible, the employee had direct evidence that she was terminated because of her pregnancy, that she was fired in retaliation for taking FMLA leave, and that the employer unlawfully denied her right to reinstatement after she completed her FMLA leave. Consequently, all of the employee's claims survived summary judgment. Human resources employees must be aware that statements they make to employees concerning the reasons they were terminated are admissible evidence that could later be used to support a legal claim. Moreover, employers should never terminate an employee because she is pregnant or retaliate against an employee because he or she takes FMLA leave.

Makowski v. SmithAmundsen, LLC, et al., No. 10-3330 (7th Cir. Nov. 9, 2011)

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